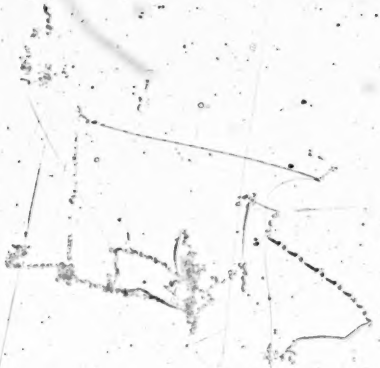


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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION, *Appellant*,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON, AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS, *Appellees*.

APPEAL FROM SUPREME COURT OF MINNESOTA

BRIEF OF APPELLEES

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APPEAL FROM SUPREME COURT OF MINNESOTA.

BRIEF OF APPELLEES

JURISDICTION

Because jurisdiction exists, if at all, under Section 237 (a) of the Judicial Code, to review a judgment upholding the constitutionality of a state statute, we challenge the attempt made by appellant to invoke jurisdiction, in the alternative, under Section 237 (c).

We assert that no substantial federal question is presented and renew our motion to dismiss or affirm (Statement Opposing Jurisdiction, p. 47).

Each of appellant's four points involves a distinct assertion of deprivation of a constitutional right. As will be seen hereinafter in detail, we challenge appellant's right to a review of any of its points, because ground for review was

not seasonably preserved below. As to all four points, we assert that they turn upon matters of local practice which either were not presented to, and passed upon by, the state Supreme Court, or have been conclusively settled by that Court against appellant, and that all the points rest upon such fallacious grounds as to be frivolous.

STATEMENT OF THE CASE

The insufficiency and inaccuracy of appellant's Statement of the Case, particularly as to the nature and scope of the Minnesota Supreme Court's ruling and as to the character of the cause of action sued on, and concerning preservation by appellant of grounds for review in this Court (Appellant's Brief, pp. 4-6), prompt us to provide a clearer approach to the questions presented than appellant furnishes.

General Nature of Questions Presented

The existence and merits of a federal question or questions depend upon the validity of the following assertions by appellant:

1. That Laws of Minnesota, 1941, Ch. 547, Sec. 18, deprive appellant of due process of law and *a vested right* by abrogating what appellant regards as a *final judgment* rendered by the state Supreme Court on the first appeal (Appellant's Brief, p. 13).

We challenge appellant's right to review of this point, because: (a) It was not seasonably presented to, nor decided by, the Minnesota Supreme Court. (b) It turns upon questions of local law not so presented or decided. (c) It turns upon contradiction of well established local law; the interpretation and application of which lie within the exclusive power of the state Supreme Court.

The merits of Point 1 turn upon:

(a) whether plaintiff asserted two or more distinct causes of action, and

(b) whether one of such allegedly separate causes of action was finally adjudicated by the state Supreme Court on the first appeal, so as to give to appellant a vested right in the adjudication, which could not "constitutionally be divested by subsequent legislative act," or by that Court's interpretation and application of such act (Appellant's Brief, p. 17).

Appellant contends that two separate causes of action are involved, and that one of them was finally adjudicated on the first appeal in appellant's favor and thereby was placed beyond constitutional revivor. We assert that there was a mere interlocutory ruling on the first appeal that limitations had not been tolled by appellant's absence from the state, and that there was no inconsistency between that ruling and application of the 1941 law to this case.

2. That the 1941 law deprives appellant of due process of law and *property* by reviving a cause of action that was barred before the statute was enacted (Appellant's Brief, p. 20).

We oppose review of this point because: (a) it depends upon a contradiction of the Minnesota Supreme Court's determination, within the scope of its exclusive powers as to local practice, concerning the nature of this action; (b) appellant fallaciously assumes that the action was necessarily barred when brought; (c) the point is not reviewable because it rests upon grounds not seasonably raised in, or passed upon by, the state Supreme Court.

On the merits, we rely upon the soundness—as well as conclusiveness—of the state Supreme Court's rejection of appellant's contention that plaintiff sued upon a cause of

action created by a statute which conditioned the right upon its enforcement within a time that expired before the action was brought. Appellant seeks a reversal of the state Supreme Court's determination which gave controlling effect to the doctrine of *Campbell vs. Holt*, 115 U. S. 620, holding that barred actions on pecuniary obligations constitutionally can be revived by statute. Appellant asks that that case be overruled, if applicable. We assert that the 1941 law is supported not only by *Campbell vs. Holt*, but by other cases in which this Court has given controlling effect to equitable considerations. Finally, we deny that the cause of action sued on is to be deemed to have been barred, in the absence of any final judgment to that effect and in view of an unreversed finding that fraud practiced by appellant was not discovered until shortly before the action was brought.

3. That the 1941 law deprived appellant of *equal protection* by reversing a rule of law previously established by the Minnesota Supreme Court and by permitting an arbitrary class of litigants to maintain actions already barred (Appellant's Brief, p. 35).

We oppose review of this point, because: (a) It was raised for the first time in appellant's petition for rehearing in the state Supreme Court, which petition was denied without opinion and without ruling. (b) It contradicts the Supreme Court's non-reviewable interpretation of a state statute. (c) It fallaciously assumes that appellant was the beneficiary of a final judgment rendered on the first appeal.

On the merits, the question involves a determination whether the 1941 law makes an unfair, unreasonable or arbitrary classification of actions, as to which the time for suing was extended. We assert that it does not.

4. That appellant has been deprived of the constitutional guaranty of a fair trial through being denied an opportunity to present evidence as to the legislative intent in enacting the 1941 law (Appellant's Brief, p. 40).

We oppose review of this point because: (a) It was first raised in appellant's petition for rehearing which was denied without opinion or ruling. (b) The competency and admissibility of the evidence and the timeliness of its offer relate to matters of local practice and procedure not controllable by this Court.

On the merits, questions arise: (a) Whether the 1941 law lacks such clearness and unambiguity on its face as to make any extraneous evidence as to legislative intent admissible? (b) Whether appellant offered any competent evidence as to such intent? We assert that these questions should be answered negatively.

Grounds of Plaintiff's Cause of Action

This action in tort was brought by appellees' decedent to recover as damages the purchase price of eight shares of the capital stock of the Chase National Bank of New York and eight shares in the Bank's securities affiliate, sold to decedent by appellant, August 10, 1929 (R. 1-11; R. 402-403, f. 1818).

The sale antedated Act of Congress, June 16, 1933 (12 U. S. C. A., Sec. 377), which required divorcement of the Bank from its affiliate. When sold the two stocks were inextricably linked together, ownership being evidenced by a single, indivisible receipt issued by the Bankers Trust Co., as depository. Neither the Bank shares nor the affiliate shares were transferable without simultaneous transfer of the other. The combined shares were quoted and sold as units, and are hereinafter referred to as "Chase units"* (R. 296,

*For a complete history of the intercorporate structure of the Bank and its affiliate, see Part 5 (1933) and Part 6 (1934) of "Hearings before the Committee on Banking and Currency, U. S. Senate, 73rd Congress, 1st Session on S. Res. 84 (72nd Congress) and S. Res. 56 (73rd Congress)" relating to "Chase Securities Corporation" and entitled "Stock Exchange Practices," particularly pages 2280-2299 of Part 5. An authenticated copy of Part 5 is in the record as Plaintiff's Exhibit A-56, admitted in evidence (R. 231-235) but not shown by the printed record.

300, Findings II-VI; R. 402-403, ff. 1818-1819).

The complaint, stating a single cause of action upon a single sale, seeks single recovery upon four separate grounds:

1. Illegal sale by appellant to plaintiff of unregistered stock, through an unlicensed salesman, in violation of the Minnesota Securities Act (hereinafter referred to as the "Blue Sky Law"), rendering the sale void and appellant liable for repayment of the purchase price (R. 2-7). Registration of the stock was required because appellant was an investment corporation and not a bank. (See *Commissioner of Securities vs. Chase Securities Corp.*, 298 Mass. 285; appealed dismissed, 302 U. S. 660.) (Illegality of the sale is conclusively established by the decision of the Minnesota Supreme Court now under review (R. 404-405, f. 1821; R. 409).)

2. Appellant's sale to plaintiff implied a representation that the stock had been registered and that its agents were licensed, as required by the Blue Sky Law, and that the sale was lawful. The representation being knowingly false, appellant is liable on the ground of fraud. (*Mary Pickford vs. Bayly Bros.*, 12 Cal. (2d) 501, 86 Pac. (2d) 102.)

3. Extensive fraudulent pool operations and other illegal manipulation of the "over-the-counter" market in Chase units, engaged in by appellant and its officers, affecting the ostensible market price of the stock sold to plaintiff "at the market" (implying a sale unaffected by market manipulation). (As to the general nature and effect of this species of wrongful practice, see *Otis & Co. vs. Securities and Exchange Comm.* (C. C. A. 6), 106 F. (2d), 579, 583, Point 4.)

4. Appellant's wilful concealment of (a) nonregistration of its stock, (b) nonlicensing of its salesmen, and (c) its pool operations and market manipulations constituted actionable deceit. (As illustrating the general basis of plaintiff's reliance on this phase, see *Strong vs. Repide*, 213 U. S. 419, and *Stewart vs. Wyoming Cattle Ranche Co.*, 128 U. S. 383.)

Chronology of Proceedings

The action was commenced in October, 1937, and was tried in the state District Court in May and June, 1939 (R. 244-245, f. 1061).

While this case was pending in the trial court, the Circuit Court of Appeals, Eighth Circuit, decided two related cases in favor of the respective plaintiffs, holding that there had been violations of the Blue Sky Law by the respective defendants, one of whom was appellant, and that limitations had been tolled by the defendants' absence from Minnesota. In neither case did the Court find it necessary to pass upon the fraud issues which also had been found in favor of the respective plaintiffs by the United States District Court for Minnesota.

City Co. of New York vs. Stern (C. C. A. 8), 110 F. (2d) 601, affirming

Stern vs. National City Co. (D. C., Minn.), 25 F. Supp. 948.

Chase Securities Corp. vs. Vogel (C. C. A. 8), 110 F. (2d) 607.

See, also, *Shepard vs. City Co. of New York* (D. C., Minn.), 24 F. Supp. 682, where it was finally adjudged without appeal that a sale of unregistered stock constituted fraud and that limitations did not commence to run until the fraud was discovered.

April 18, 1940, the state District Court, in this case, like the Circuit Court of Appeals in the *Stern and Vogel cases, supra,* decided that there was a sale in violation of the Blue Sky Law and that limitations were tolled by appellant's absence from the state, and therefore found it unnecessary to pass on the fraud issues (R. 258, Finding XXVI).

January 10, 1941, the Minnesota Supreme Court, by a four-

to three decision, reversed the judgment of the trial court *on the sole ground that limitations had not been tolled by appellant's absence from the state*, and remanded the case *without prejudice to further proceedings on "issues other than that of the tolling of the statute of limitations"* (R. 362-363, f. 1766; 209 Minn. 166).

March 31, 1941, this Court granted certiorari in the *Stern and Vogel cases, supra*, and remanded them to the Circuit Court of Appeals "for further proceedings with respect to *any question not determined by the Supreme Court of Minnesota* in the Pomeroy and Donaldson cases" (312 U. S. 666); mentiling the case at bar and a companion case, on the authority of which the ruling on the first appeal herein was made.

The *Stern case, supra*, has been disposed of by stipulation, but the *Vogel case, supra*, remains abeyant in the Circuit Court of Appeals, pending final determination of the case at bar.

This case having reached the trial court, on remand after the first appeal, appellees on *April 9, 1941*, moved for a determination of the fraud issues (R. 244-259).

April 28, 1941, and effective July 1, 1941, the statute the validity of which this Court is now called upon by appellant to determine, became a law (Laws of Minnesota, 1941, Chap. 547, Sec. 18; *Minnesota Statutes, 1941*, Sec. 80.26). (Like appellant, we hereinafter refer to it as the "1941 law.") The statute is part of an act that amended the Blue Sky Law in many particulars not here involved. We quote the text of Section 18 hereinafter. In substance, the section requires actions of this kind, so far as based upon violations of the Blue Sky Law, to be brought within six years after the date of delivery of the stock; "*provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may*

be brought within a period of one year following such effective date."

May 14, 1941, appellant moved for findings, etc., in its favor, on the theory that the action was grounded upon violation of the Blue Sky Law, that the action was barred, and that there was no proof of fraud (R. 287-294).

May 16, 1941, plaintiff moved for supplemental findings, etc., with respect to the applicability of the 1941 law (R. 285-286).

June 27, 1942, the trial court made its first determination in the case after the cause had been remanded on the first appeal. The Court found for plaintiff on all of the grounds of recovery set up in the complaint, as hereinbefore summarized (R. 295-317); specifically finding on the *merits*: (1) That plaintiff was entitled to recover in tort on the ground of an illegal sale to plaintiff (R. 306-307, Finding XXI). (2) That the sale to plaintiff implied a representation that there had been compliance with the Blue Sky Law (R. 303-304, Finding XV). (3) That appellant knew that the law required registration of the stock and wilfully failed to register (R. 305-306, Finding XIX). (4) That appellant, associated with others, engaged in pool operations whereby the market price of the Chase units was manipulated and controlled and the public was deceptively induced to buy (R. 308-313, Findings XXVI-XXXI). (5) That appellant knew that an application to register the stock would necessitate revelation of the facts concerning the pooling operations, etc. (R. 305-306, Finding XIX). (6) That appellant misrepresented to plaintiff that there was a free, uncontrolled and unmanipulated market for the stock (R. 304, Finding XVI; R. 307, Finding XXII). (7) That appellant concealed nonregistration of the stock, nonlicensing of its salesmen and the market manipulations (R. 304-305, Findings XVII, XVIII; R. 313, Finding XXXII). As to *limita-*

tions, the trial court found: (1) That plaintiff did not discover any of the fraud aspects covered by the findings above summarized until on or about October 1, 1937, shortly before this action was begun (R. 313-314, Findings XXXII, XXXIII). (2) That so far as the 1941 law applies to "plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff" the time for suing was extended by that law to July 1, 1942, and the action was brought "within the time limited by the statutes of the state" (R. 313-314, Finding XXXIV).

After denial of appellant's motion for amended findings, etc. (R. 351), and on *November 25, 1942*, judgment for plaintiff was entered, awarding recovery of a single sum, with costs and disbursements (R. 351-352).

The same day appellant appealed to the Minnesota Supreme Court from the judgment, and on December 31, 1943, that Court affirmed the judgment (R. 401, 409; 216 Minn. 269, 278).* The Court decided:

(1) "The action was brought in tort to recover as damages the purchase price of unregistered securities sold in Minnesota," etc. (R. 402, f. 1818; 216 Minn. 270).

(2) It was unnecessary to pass on the deceit aspects (R. 403, f. 1818; 216 Minn. 270-271).

(3) The Blue Sky Law clearly required the securities to be registered (R. 404, ff. 1820-1821).

(4) "Since the stock was not registered the plaintiff is entitled to recover the purchase price unless barred by the statute of limitations" (R. 404-405, par. 2; 216 Minn. 273).

(5) The 1941 law "authorizes the bringing of all causes where the delivery of the stock had been made more than five years before the effective date of the limitation, if brought within one year from the effective date

*During the pendency of the appeal to the Minnesota Supreme Court, the plaintiff died, and appellees, executors of her estate, were substituted as respondents.

of the section, whether more than six years had elapsed since delivery or not" (R. 405, par. 3; 216 Minn. 273). The Court concluded: "We regard the proviso here under consideration as lifting the bar of the general six-year limitation" (R. 406, f. 1822; 216 Minn. 274).

(6) "By lifting the bar of the statute as applied to this case," the legislature did not violate "the due process clauses of the state and federal constitutions" (R. 406, par. 4; 216 Minn. 274; R. 408, f. 1825; 216 Minn. 277).

(7) The 1944 law applies to cases pending when the law was enacted (R. 408-409, par. 5; 216 Minn. 277).

The companion case, disposed of by the Minnesota Supreme Court at the same time and for the same reason (*Bain vs. National City Co.*, 216 Minn. 278, frequently referred to as the "Pomeroy Case") was not appealed. The case at bar comes before this Court under an order allowing an appeal, filed in the Minnesota Supreme Court, April 22, 1944 (R. 475-481).

Appellant's Position Summarized

An analysis of appellant's brief shows that, to support its claim under Point 1, that the judgment appealed from deprives appellant of a vested right acquired under a supposedly final judgment rendered on the first appeal to the Minnesota Supreme Court, reliance is placed upon assumption: (1) That plaintiff sued on *two separate causes of action*, one based upon violation of the Blue Sky Law, the other upon common law fraud. (2) That the Minnesota Supreme Court decided on the first appeal that the first cause of action *was barred by limitations*. (3) That the decision on the first appeal amounted to a *final judgment*, *res judicata*, precluding its disturbance by any subsequently enacted statute or by any later decision by the Supreme Court in this, *the same*, case (Appellant's Brief, p. 13).

Appellant's Point 2 rests upon assumption that the 1941 law revived a *cause of action that had been barred*—a supposedly *separate cause of action based upon statutory violation*—and that appellant was thereby deprived of *property* (Appellant's Brief, p. 20).

Appellant's Point 3 rests upon the assumption that the 1941 law was specifically enacted to *reverse a rule of law previously settled in appellant's favor*, so as to allow maintenance of actions *already barred* (Appellant's Brief, p. 35).

Appellant's Point 4 rests upon the assumption that appellant was denied the opportunity of offering evidence to contradict the state Supreme Court's determination as to what the legislature intended in enacting the 1941 law (Appellant's Brief, p. 40).

Therefore, we proceed with a discussion of the nature of this action, whether involving one or more than one cause of action; as to what the state Supreme Court really decided on the first appeal; as to what rights, if any, appellant thereby acquired; as to whether this action was barred when it was brought; and as to what interpretation the Supreme Court really placed upon the 1941 law. In addition, we state facts of the case bearing upon the right of appellant to have its various contentions reviewed by this Court.

Character of Cause of Action

Contrary to an intimation in appellant's brief (top p. 5), the complaint (R. 4-10) states a single cause of action, counting on fraud and nonregistration of the securities sold, contrary to the Blue Sky Law, as inhering in the single tortious sale.

Far from raising any claim that two causes of action were stated in the complaint, the answer treated it as stating but one, based upon a single transaction. Par. XI averred:

"* * * Defendant alleges:

"1. That the *transaction* giving rise to plaintiff's alleged *cause of action* arose out of a *transaction*," etc. (R. 16).

"5. Alleges that plaintiff's *cause of action*, if any, did not accrue within six years * * * and *is* barred." etc. (R. 18).

When the trial opened appellant took a position that clearly negatived any claim or conception that the pleading of both statutory violation and fraud stated separate causes of action. Counsel did ask that plaintiff be compelled to elect between "*two inconsistent* causes of action," one charging defendant with breach of fiduciary duty *as plaintiff's agent* in buying the stock for her *and one charging defendant as seller to plaintiff* (R. 25). Appellant, by challenging the complaint as stating two causes of action, solely because it charged appellant in dual capacities, recognized that the complaint was not to be regarded, on any other theory, as stating more than one cause of action. At the same time, plaintiff conceded in open court that reliance was placed "mainly upon the relationship of seller and buyer between the parties." Thereupon counsel for appellant acquiesced in the trial judge's observation that plaintiff's concession *disposed of appellant's contention that two causes of action were involved*, and in the observation that there remained to be tried but two issues growing out of the sale—fraud and nonregistration (R. 33-34, f. 96). See also, R. 151, f. 269, where appellant's counsel referred to the foundation of plaintiff's "cause of action."

Appellees rely upon the above recited proceedings as constituting a binding stipulation in open court that the action involved but a single cause of action.

There is nothing in the subsequent proceedings below that laid ground for review of appellant's present contention that two separate causes of action are involved.

On the second hearing in the trial court, appellant did ask for amended findings in which reference was made to a cause of action based on statutory liability and a cause of action based on fraud (R. 292, par. 17 (a)-(c); R. 293-294, pars. 1, 2, 4). But there was no request for any finding or conclusion of law that separate causes of action were involved. Nor did any such request accompany appellant's later motion to amend the trial court's final findings. That motion proceeded upon a theory that the evidence established but a single cause of action, based upon statutory violation (R. 326, par. (b); R. 328, par. 4; R. 348, par. 3). In the same motion, appellant intimated recognition that but one cause of action was presented, by asserting "That *the transaction* giving rise to plaintiff's *cause of action* was not * * * consummated in Minnesota," etc. (R. 329, par. 9).

The assignments of error presented to the Minnesota Supreme Court on the second appeal (R. 364-400) raised no question as to the number of causes of action involved, as to the nature of the determination made by the Supreme Court on the first appeal, or as to the nature of any right acquired by appellant under that determination, although Subdivision D of the assignments was devoted to "the Nature of Action," etc. (R. 384-386). The assignments selected for presentation in the appellant's separately printed Jurisdictional Statement (Appendix H, pp. 48-49) disclose no attempt to raise those questions in the state Supreme Court. Nor is there anything in the opinion of the Supreme Court (R. 401-409; 216 Minn. 269-278) to show that any of the questions were raised or passed upon in the Supreme Court. Not until its petition for rehearing (R. 410, *et seq.*), which was denied without opinion or ruling (R. 474, f. 1936), did appellant distinctly raise any question of final judgment or vested rights (R. 414, *et seq.*). Even then appellant insisted that there was but one cause of action in the case, based upon

statutory violation (R. 413-414, par. IV).

Nature of Determination on First Appeal

As to the scope and effect of the determination on the first appeal, we accept as an accurate statement, the recital by appellant in its Petition for Rehearing in the state Supreme Court, that the first appeal "*decided only the tolling question*" (R. 413, par. 4).

As hereinbefore shown, the case went to the state Supreme Court on the first appeal, with reservation by the trial court of determination of fraud issues, and the Supreme Court did not determine anything but that limitations *had not been tolled by appellant's absence from the state* (R. 353, syl. 4; R. 362, f. 1766; 209 Minn. 155, 166):

Specifically, the Supreme Court's opinion read:

> "Our decision in a companion case [the Pomeroy case] * * * is decisive of the only question presented by this appeal and requires reversal of the order under review.
>
> "This record indicates the presence of issues *other than that of the tolling of the statute of limitations.* If, in respect to such issues, there are further proceedings below, this decision is without prejudice to them or the result" (R. 362-363, f. 1766). (Italics supplied.)

That is the determination to which appellant repeatedly refers in its brief as a *final judgment* that became *res judicata* on the point that this action was *barred by limitations* and thereby gave appellant *vested property.*

Subsequent Proceedings

What happened, in the light of the 1941 law, in the trial court after remand of the case on the first appeal, and in the Supreme Court on the second appeal, is detailed hereinbefore under the subheading, "Chronology of Proceedings."

Minnesota Statutes Involved

When this action was brought Minnesota's general statutes of limitation contained these provisions:

> "9191. *Various cases*, six years—The following actions shall be commenced within six years:
>
> "1. Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed.
>
> "2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture.
>
> * * * * * * * * * *
>
> "6. For relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." (*Mason's Minn. Stats., 1927*, Sec. 9191.)

Appellant now asserts that this action involves two distinct causes of action, one governed by clause 2 as counting on a "liability created by statute," and a separate cause of action for fraud, controlled by clause 6. Appellant says that the ruling on the first appeal conclusively shows that this action is barred as having been brought under clause 2 more than six years after appellant made the illegal sale of stock to plaintiff.

On the other hand, we assert that the single sale of a single block of stock resulting in single damage did not give rise to two distinct causes of action merely because appellant's acts were doubly wrongful, but rather to a single cause of action which could never be regarded as barred until a final determination to that effect; that, prior to the enactment of the 1941 law there had been no determination in this case beyond a mere interlocutory ruling that limitations had not been tolled by appellant's absence from the state; that, therefore, there was no possible constitutional bar to the legislature enacting an amendatory law under which the action must be

deemed to have been brought in time.

But even if we should concede, *arguendo*, that there were two separate causes of action; and that, at the time of the enactment of the 1941 law, limitations had run as to the so-called "statutory cause of action," appellant would still be in error; because

(1) The Minnesota limitation statute prior to 1941, being a general one, did not affect the right, but only the *remedy*, for the enforcement of an otherwise incontestable obligation to repay money.

In re Daniel's Estate, 208 Minn. 420.

The defense of limitations, when it affects the remedy only, does not constitute a vested right.

Campbell vs. Holt, 115 U. S. 620.

(2) Even the entry of a final judgment could not convert a defense of limitations into a vested right immune from retroactive legislation.

West Side Belt R. Co. vs. Pittsburgh Const. Co., 219 U. S. 92.

(3) Strong equitable considerations justified the enactment of the 1941 law and support its validity, aside from *Campbell vs. Holt, supra*.

Robinson vs. Robins Dry Dock & Repair Co., 238 N. Y. 271.

(4) The obligation did not rest upon a statute which conditioned the right upon its enforcement within a specified time.

(5) There being no question as to appellant's liability,

"This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached."

Graham vs. Goodcell, 282 U. S. 409.

This is the text of the 1941 law so far as here material (Laws of Minnesota, 1941, Chap. 547, Sec. 18; *Minn. Stats., 1941*, Sec. 80.26):

"No action shall be maintained * * * upon a sale of securities made in violation of * * * this act, *or* upon a

sale of securities made in violation of the provisions of a registration thereof, *or* for failure to disclose that the sale * * * was made in violation * * * of this act or * * * the provisions of registration, * * * *or* upon any representation with respect to the registration or nonregistration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser, * * * *provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within one year following such effective date.*" (Italics supplied.)

The State Supreme Court's Interpretation of the 1941 Law

In lieu of an accurate statement of what the Supreme Court decided, concerning the scope and meaning of the 1941 law immediately above quoted, appellant's brief (p. 4) substitutes a misleading version. What the Supreme Court actually declared speaks for itself. After quoting the essential provisions of the statute (R. 404, f. 1820), the Court said, so far as concerns its interpretation of the statute, as distinguished from its conception of circumstances that influenced the legislature to enact the statute:

> "The plain language of the proviso authorizes the bringing of all causes where the delivery of the stock had been made more than five years before the effective date of the limitation, if brought within one year from the effective date of the section, whether more than six years had elapsed since delivery or not; but it is the contention of the defendant that it should be interpreted as if it read 'more than five years *and less than six years* shall have elapsed,' etc." (The Court supplied the italics.) (R. 405, f. 1821; 216 Minn. 273.)
>
> "* * * If the clause in the proviso relating to causes arising more than five years previously were to be interpreted as defendant contends, it would apply to few, if any, cases. Causes of action for such violations were not distinguished from those in deceit which under

> the prior law may or may not have accrued more than six years prior to the effective date of the act. * * * We regard the proviso here under consideration as lifting the bar of the general six-year limitation" (R. 405-406, f. 1822; 216 Minn. 274).

As will be seen in our argument under our Points II and III, *post*, appellant is not supported in its claim (p. 37) that the Supreme Court construed the 1941 law as being directed against appellant and the National City Company only.

Contentions Not Timely Raised

Appellant's Statement of the Case tends to mislead in its recital (p. 4) that the Minnesota Supreme Court's decision and judgment "were entered over appellant's contentions that the statute, as so construed * * * constituted unreasonable class legislation in violation of the equal protection clause; and that appellant had been denied a fair trial, contrary to due process, on the issue of legislative intent."

Appellant did contend that the 1941 law violated the Due Process Clause (R. 406, f. 1822; 216 Minn. 274) and the Court explicitly overruled that contention (R. 408, f. 1825; 216 Minn. 277). But it does not appear from the state Supreme Court's opinion or otherwise that the claim of denial of due process was presented to that Court, prior to the petition for rehearing, on any contention that more than one cause of action was stated in the complaint, that there had been a final judgment on one cause of action, that appellant had a supposed vested right in the judgment, etc. No contention that the statute violated the Equal Protection Clause, or that appellant unconstitutionally had been denied a fair trial on the issue of legislative intent, was raised until appellant petitioned for rehearing (R. 412-413, ff. 1840-1841; R. 414, f. 1842). Appellant's brief (p. 10) is inaccurate so far

as it intimates that in its petition for rehearing appellant "*again*" contended that the statute violated the Equal Protection Clause and that appellant unconstitutionally had been denied a trial on the issue of legislative intent.

Appellant correctly states (p. 10) that the petition for rehearing was denied "without opinion" (R. 474, f. 1936). Therefore, there was no ruling or decision upon any of the numerous contentions advanced by appellant in the petition for rehearing (R. 440-457, ff. 1836-1905).

Other Inaccuracies Listed

Without here attempting to list every inaccuracy in appellant's Statement of the Case, we do feel that a proper approach to the argument requires correction of recitals at the following mentioned pages of appellant's brief:

p. 5. An intimation that the case was tried below as involving two causes of action is inaccurate, as hereinbefore shown.*

p. 6. The summary of what was decided on the first appeal in this case is misleading in its intimation that the decision foreclosed further determination excepting as to appellees' rights under a supposedly separate cause of action for fraud. As shown by the decision (R. 362-363, f. 1766), by the judgment (R. 363, f. 1767), and by the mandate (R. 275-277, ff. 1098-1101) the only final judgment rendered was one for costs. The orders appealed from were merely reversed and the case remanded to the trial court for further proceedings on "issues other than that of the *tolling* of the statute of limitations," as to which the decision was declared to be "without prejudice to them or the result" (R. 362-363, f. 1766). It will be seen that appellant errs in saying (p. 6) that in remanding the case, the Supreme Court explicitly limited the trial court to a "determination of the remaining issue of fraud."

*That this contention is an afterthought is indicated by appellant's substitution of "causes of action" in its brief for "grounds" or "issues" wherever those words appear in its Jurisdictional Statement.

SUMMARY OF ARGUMENT

Appellant presents no reviewable question as to any of its four principal points, because: (1) The grounds upon which the points argued rest are not shown to have been seasonably advanced in the state Supreme Court. (2) The grounds upon which each point rests relate to matters of well-settled local law and practice, as to which the conclusions of the Minnesota Supreme Court are not reviewable. (3) The mere statement by appellant of each point shows that it is so lacking in merit on its face as to be frivolous.

Point 1

Appellant's contention (Point 1, p. 13) that the 1941 law, as construed and applied, deprives it of a vested right without due process, depends entirely upon the nature of the determination made by the Minnesota Supreme Court on the first appeal in this case. Appellant claims that that determination was a *final judgment* in appellant's favor and became *property* of which it could not be divested. That contention, in turn, rests upon an assumption that plaintiff sued on two separate causes of action—one statutory and one common-law. Appellant says that the first cause of action was eliminated from the case by a supposed determination on the first appeal that it was *barred*, leaving only a common-law fraud action to be passed upon.

Before coming to the merits of this point, we draw attention to these facts: Appellant never presented to the state Supreme Court any of the contentions involved in its Point 1, nor were any of them passed upon by that Court. Appellant never asked the Supreme Court to determine the nature of the ruling on the first appeal, or whether the case involved two separate causes of action, or to decide that the ruling on

the first appeal gave appellant property or vested right, or that the subsequent judgment of the trial court rested upon a cause of action that previously had been finally adjudged to be barred. No question of constitutional right as to this aspect of the case was raised. The assignments of error presented to the Supreme Court (R. 361-490) raised no such questions.

On the merits, we contend that the case presents a single cause of action for wrongful sale to the plaintiff of a single block of stock as one entire transaction, grounded upon doubly wrongful conduct that combined to induce the single purchase—violation of the Blue Sky Law and common-law fraud. The Supreme Court on the first appeal merely made an *interlocutory ruling* that limitations had not been tolled by appellant's absence from the state. That ruling was, at most, law of the case which did not stand in the way of a subsequent ruling that limitations had not run for another reason. The Court bindingly decided that this action is in tort and not on a statutory liability.

Point II

Appellant's contention (Point 2, p. 20) that the 1941 law deprives it of *property* without due process depends upon the fallacious premises: (1) That, *contrary to the state Supreme Court's explicit interpretation of Minnesota statutes*, this is an action on a liability created by a statute which made limitations a part of the right, thereby precluding constitutional lifting of the bar retroactively. (2) That plaintiff's cause of action necessarily was barred before the action was brought. (3) That appellant's right to plead the supposed bar was "property." (4) That *Campbell vs. Holt*, 115 U. S. 620, does not apply, but, if applicable, should be overruled by this Court.

As to jurisdiction of this Court to review appellant's Point 2, we contend that except as the Minnesota Supreme Court's opinion shows on its face the scope of the constitutional question passed upon by that Court, nothing is presented for review. The opinion conclusively rejected appellant's contention that this is an action on statutory liability. There is nothing in the Record to indicate that, prior to filing of appellant's petition for rehearing, which was denied without opinion or ruling, appellant ever specified wherein it had acquired property that was divested by the 1911 law or why it must be considered that plaintiff's cause of action was barred before the law was enacted. Appellant's assignments of error in the Minnesota Supreme Court (R. 364-400) did not even raise any general claim of deprivation of due process.

On the merits, our position is: (1) The state Supreme Court's decision that this is not an action on statutory liability is sound and controlling. (2) It does not appear that plaintiff's cause of action ever was barred. (3) No judicial determination in this case ever finally adjudged anything in appellant's favor or conferred any property right upon appellant. (4) Even if the action was barred before the 1911 law was enacted, the bar constitutionally was lifted under the well-established doctrine of the *Campbell Case*, *supra*, and other cases decided by this Court. None of those cases involved stronger equitable considerations favoring lifting of a statutory bar than does this case. (5) Appellant does not establish its contention that the doctrine of *Campbell vs. Holt* should be overruled.

Point III

Appellant does not substantiate its contention (Point 3, p. 35) that the 1941 law, as construed and applied by the Minnesota Supreme Court, violates the Equal Protection Clause. The contention in substance is a mere restatement of appellant's Points 1 and 2, substituting an assertion of denial of equal protection for denial of due process. It reiterates the claim that the 1941 law, as interpreted and applied, deprives appellant of a supposed property right in a supposed final judgment that never existed.

The point is not reviewable because not seasonably raised in the state Supreme Court, having been advanced for the first time in the petition for rehearing which was denied without opinion or ruling.

On the merits, we argue that, as plainly worded and broadly interpreted by the Minnesota Supreme Court, the 1941 law operates impartially upon all litigants falling within a just and reasonable classification.

Point IV

Appellant contends (Point 4, p. 40) that the Minnesota Supreme Court denied appellant a fair trial by refusing to reopen the case after it had been decided, to enable appellant to offer certain incompetent and inadmissible evidence concerning the legislature's intention in enacting the 1941 law. The point is based upon a statement in the Court's opinion of circumstances which might have induced the enactment.

Appellant fails to distinguish between the state Supreme Court's *interpretation* of the 1941 law, according to the clear and unambiguous *wording of the statute*, and mere casual observation by the Court as to circumstances which may have influenced the legislature.

The contention was first raised by petition for rehearing in the Supreme Court after the case had been decided, and the petition was denied without opinion or ruling. Therefore, the point is not reviewable now. Should we concede, *arguendo*, that legislative intent was a matter upon which the parties were entitled to submit extraneous evidence, the fact would still remain that legislative intent became an issue in the case on May 16, 1941, when plaintiff moved for supplemental findings as to the 1941 law. That was more than a year before the case was finally decided by the trial court, and long before appellant took its second appeal to the state Supreme Court. So, appellant furnishes no valid excuse for delay in raising the point.

But, on the merits, we contend that the Supreme Court did not err in disregarding appellant's offer of proof, because no extraneous evidence was admissible to contradict the legislative intent found by that Court to have existed by reason of the plain wording of the statute. Furthermore, if extraneous evidence had been admissible that offered by appellant was incompetent because it consisted of mere affidavits of two legislators and a state official and of legislative journals and legislative committee reports, all offered to show that there was "no affirmative evidence of intention to revive barred causes of action" (Appellant's Brief, pp. 42-43). We regard appellant's Point 4 as being so frivolous on its face as to be nonreviewable by this Court, apart from the fact that it was not seasonably raised.

ARGUMENT AND AUTHORITIES

I.

Appellant's Contention, That the 1941 Law, as Construed and Applied by the Minnesota Supreme Court, Deprives Appellant of a Vested Right Without Due Process of Law, Is Not Reviewable and Is So Lacking in Merit as to Be Frivolous.

(See Appellant's Brief, p. 13.)

As shown by the first three paragraphs of appellant's argument under its Point 1 (pp. 13-14) that point rests entirely upon these fallacious subsidiary contentions: (1) That the state Supreme Court's determination on the first appeal was a *final judgment* determining that, so far as plaintiff's claim was grounded upon appellant's illegal sale to her of unregistered stock, the *action was barred*, and nothing remained to be adjudicated in the case excepting issues as to common-law fraud. That the judgment was "*property*" of appellant. (2) That there were two distinct causes of action involved—one *statutory* and one *common-law*—and the determination on the first appeal disposed of the first, leaving only the second, limited to a fraud theory, to be decided.

If the determination on the first appeal, *that limitations were not tolled by appellant's absence from the state*, and the remand of the case to the trial court for trial "*of issues other than that of the tolling of the statute of limitations*," as to which the decision was declared to be "*without prejudice to them or to the result*" (R. 362, 363, f. 1766) was *not a final judgment that the action was barred*, appellant's Point 1 collapses. Likewise it collapses if the action presents a single cause of action for a single tort, because then in no view of the case could the determination on the first appeal be regarded as a final judgment. Furthermore, the point must

fail on this Court deciding that it ~~cannot~~ or will not disturb the Minnesota Supreme Court's determination on the second appeal that the case was "pending" when the 1941 law was enacted (R. 408-409).

A.

Appellant's Point 1 Is Not Reviewable.

Appellant's contentions under this head are not reviewable, because: (1) They were not seasonably presented to, or decided by, the Minnesota Supreme Court. (2) They turn upon contradiction of well-established local law and practice, the interpretation and application of which lie within the exclusive power of the state Supreme Court.

(1) Not Seasonably Presented.

Appellant makes no pretense that its contentions now under discussion were presented to the Minnesota Supreme Court, excepting in a petition for rehearing filed after the Court had decided the case (R. 438-440, Subd. III). It is conceded that that petition was denied without opinion and without ruling (R. 474, f. 1936). In short, appellant did not seasonably call upon the Court, by assignment of error or otherwise, to determine the character of the ruling made on the first appeal, or to adjudge that it amounted to a *final judgment* that part of the action was barred, or to declare that appellant acquired *property* in the ruling on the first appeal of which it could not be divested under the doctrine of *res judicata* or under the Due Process Clause.

The opinion of the Minnesota Supreme Court here under review does not disclose that it passed upon, or was called to pass upon, any constitutional question depending upon the nature of the ruling made on the first appeal. That opin-

ion does contain this passage concerning the 1941 law: "Does the proviso apply to cases already *pending?* We think it does, even though it was passed subsequent to a determination by this Court that the cause was barred" (R. 408-409). (For reasons to be shown hereinafter, in discussing the nature of the ruling on the first appeal, the quoted statement by the Court is not to be regarded as an adjudication that the action was barred before the 1941 law was enacted.)

In presenting the contentions now under consideration appellant overlooks the—

> "cogent reasons why this Court should not undertake to decide questions of local law without the aid of some expression of the views of judges of the local courts who are familiar with the intricacies and trends of local law and practice. We do not ordinarily decide such questions without that aid where they may conveniently be decided in the first instance by the court whose special function it is to resolve questions of the local law of the jurisdiction over which it presides."
>
> *Busby vs. Electric Utilities Employees* (Dec. 4, 1944), 89 L. Ed. 109, 7 Adv.

> "We have often had occasion to point out * * * that questions of state law required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review."
>
> *Huddleston vs. Dwyer*, 322 U. S. 232.

Because no question concerning finality of the decision rendered on the first appeal, or as to appellant having any property in the decision, was raised by assignment of error in the state Supreme Court or passed upon by that Court, and there is no showing that the questions otherwise were seasonably raised in that Court, they are not open to consideration in this Court.

Hulbert vs. City of Chicago, 202 U. S. 275, 281.

Questions not presented to the Minnesota Supreme Court by assignments of error or brief will not be considered by that Court, even if they were presented by motion for new trial in the lower court.

Peterson vs. Pete-Erickson Co., 186 Minn. 583, 585.

Minnesota Supreme Court Rule VIII (3, 4), 212 Minn. xli-xlii.

To give this Court jurisdiction of a state judgment, it must appear on the record, not only that a federal question was presented to the highest court of the state for decision, but that it was decided, *or that its decision was necessary to the judgment rendered.*

Chouteau vs. Gibson, 111 U. S. 200, 201.

This Court declines to pass upon a contention that an appellant has been deprived of property without due process of law until the existence of the property is first established.

City of New Orleans vs. New Orleans Water Works Co., 142 U. S. 79.

May 16, 1941, appellant was notified (R. 285-286) that plaintiff relied upon the 1941 law as establishing the timeliness of the action, and appellant was thereby apprised that plaintiff would insist that the determination on the first appeal did not stand in the way of a final adjudication in plaintiff's favor on all of the issues in the case, excepting the issue settled on the first appeal, namely, that appellant's absence from the state did not toll limitations.

It thus conclusively appears that this is not a case where appellant could not have anticipated application of a particular statute to the case until after rendition of a decision by the state's highest Court, and therefore, properly could challenge the validity of the statute for the first time by petition for rehearing. (*Ogsbury vs. Georgia*, 295 U. S. 111, 113-114.)

The procedure that appellant should have followed if it intended to preserve a constitutional question for review in this Court is indicated in *Schuylkill Trust Co. vs. Pennsylvania*, 296 U. S. 113, where the facts upon which asserted unconstitutional discrimination was claimed to exist were subject to specific requests for conclusions of law in the trial court, specific assignments of error in the state Supreme Court, etc.

Because the contentions underlying Point 1 were raised for the first time in a petition for rehearing which was denied without opinion and without ruling upon any of the numerous contentions advanced in it, those contentions are not now reviewable.

Godchaux Co. vs. Estopinal, 251 U. S. 179, 181;
American Surety Co. vs. Baldwin, 287 U. S. 156, 163.

In passing, it is to be noted that even in the appellant's petition for rehearing, counsel's thoughts were not coherent as to the nature and effect of the state Supreme Court's ruling on the first appeal. In Subdivision III of the petition, attempt was made to convince the Court that it had decided on the first appeal, as a "total and final determination" that the *action was barred*, so far as counting on statutory violation (R. 138). But, earlier in the petition (p. 113, par. 4) appellant declared that *the only thing decided on the first appeal was the tolling question.*

(2) Appellant Contradicts the Conclusions of the State Supreme Court on Matters of Local Law and Practice, as to Which That Court Has the Last Say.

Contradicting the statement by the state Supreme Court quoted above, that this action was still "pending" when the 1941 law became effective, yet recognizing that the Court did not regard the ruling on the first appeal as being a final judgment, appellant contends (p. 17):

> "It follows necessarily that the cause of action for breach of statute, so adjudicated and 'merged and gone forever,' was not pending in any sense after the case was remanded on the other cause of action and when the 1941 law was passed. * * *
>
> "*It is readily apparent that both courts considered and decided the question of revival as though the prior judgment in this very case was entitled to no legal effect whatsoever.* * * *
>
> "Disregard of the prior and final adjudication of the statutory cause of action lead inevitably to error. Certainly that judgment in appellant's favor constituted personal property and a valuable right, which thereby became vested in appellant." (Italics supplied.)

Without prejudice to the result we could, though we do not, admit that the decision here under appeal constituted a reversal of the decision rendered on the first appeal, and then quote what this Court said in *Tidal Oil Co. vs. Flanagan*, 263 U. S. 444, 450:

> "The parties to this action have been fully heard in the state court in the regular course of judicial proceedings, and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party, does not take away his property without due process of law."

This Court will not review a question whether a decision of a state Court, in effect, and erroneously, overruled prior

decisions of that Court.

Central Land Co. vs. Laidley, 159 U. S. 103, 112.

The mere fact that the highest Court of a state has reversed its prior construction of a statute dealing with modes of local procedure does not empower this Court to review the correctness of the construction, nor does it necessarily follow that this Court has jurisdiction on a theory of deprivation of fundamental rights.

A. Backus, Jr., & Sons vs. Ft. Street Union Depot Co., 169 U. S. 557, 570.

A determination by a state's highest court as to the finality of a determination under local law is binding on this Court.

Wheeling & Belmont Bridge Co. vs. Wheeling Bridge Co., 138 U. S. 287.

"The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here."

Chouteau vs. Gibson, 111 U. S. 200, 201.

The scope and effect of a state judgment is peculiarly a question of state law.

Kenney vs. Craven, 215 U. S. 125, 130.

The Minnesota Supreme Court has decided:

"That, to be pleadable in bar, a former adjudication must be a final determination *of the merits* of the action, is elementary."

Craver vs. Christian, 34 Minn. 397, 398.

A judgment of dismissal because of limitations, without an adjudication of the merits does not merge the cause of action.

2 *Beale, Conflict of Laws*, 1125, Sec. 450.11, citing:
Brand vs. Brand, 116 Ky. 785.*

*A New York court had directed judgment for defendant because the action was barred by limitations, under New York law. Respecting the New York rule that limitations go to the remedy only, the Kentucky court held that a new action was maintainable in Kentucky on the same cause of action, which was not barred by Kentucky law.

B.

Appellant's Point 1 Is Unsound on Its Merits.

Should the Court be disposed to consider appellant's Point 1 on its merits, we believe that an analysis of appellant's argument will show that this question is presented:

Was the decision of reversal upon the first appeal—accompanied by a judgment for appeal costs and a remittitur for "further proceedings" in respect to "issues other than the tolling of the statute of limitations"—the equivalent of a final judgment on the merits on a separate and distinct cause of action based "upon a liability created by statute," so as to give appellant a vested right in such judgment?

In arguing the affirmative, appellant proceeds upon the following premises, the falsity of any one of which will invalidate its entire Point 1:

1. That plaintiff sued on two separate causes of action.
2. That the liability of a seller of corporate stock illegally sold for lack of registration, is a "liability created by statute," and not an "obligation, express or implied, as to which no other limitation is expressly prescribed," within the meaning of the Minnesota general statute of limitation (*Mason's Minn. Stats., 1927*, Sec. 9191 (1) (2); *Minn. Stats., 1941*, Sec. 541.05 (1) (2).
3. That the decision rendered by the Minnesota Supreme Court on the first appeal was a final judgment on the merits and *res judicata*.
4. That "The cause of action for breach of the statute was not pending in any sense after the case was remanded on the other cause of action and when the 1944 law was passed."

Our argument that follows is based upon propositions argued in the following order: (1) No final judgment was rendered on the first appeal; the Supreme Court merely made an interlocutory ruling that limitations had not been tolled

by appellant's absence from the state, and remanded the cause to the trial court with power to determine any issue other than whether limitations had been tolled by appellant's absence from the state. (2) The cause was still pending when the controlling statute, the 1941 law, became effective; therefore, the Supreme Court on the second appeal properly ignored its interlocutory ruling made on the previous appeal. (3) The case involves a single common-law cause of action based upon a single tortious sale of stock to the plaintiff, that was doubly wrongful because at one and the same time appellant violated the Blue Sky Law and committed common-law fraud.

(1) No Final Judgment Was Rendered by the Minnesota Supreme Court on the First Appeal; There Was Merely an Interlocutory Ruling That Limitations Had Not Been Tolled by Appellant's Absence from the State.

Even if there had been a final judgment on the first appeal that the action was in whole or in part barred, we should still rely upon doctrine discussed in our Point II, *post*, as sustaining the validity of the 1941 law. But, since appellant's brief relies principally upon the character of the determination on the first appeal we are constrained to discuss the point in detail.

The first appeal submitted two questions to the Minnesota Supreme Court: (1) Did the proof support the trial court's finding that appellant violated the Blue Sky Law by selling unregistered securities to plaintiff? (2) Were limitations, under existing statutes, tolled by defendant's absence from the state? The Supreme Court answered the second question no, and therefore found it unnecessary to answer the first. The case was sent back to the trial court with wide-open authority to pass upon any issue in the case "other than

that of the tolling of the statute of limitations" (R. 362-363, f. 1766).

The full scope of the Supreme Court's bare majority decision on the first appeal appears in this brief opinion:

> "Our decision in a companion case, *Pomeroy vs. National City Co.*, 209 Minn. 155, 296 N. W. 513, is decisive of *the only question presented by this appeal* and requires reversal of the judgment under review.
>
> "This record indicates the presence of issues *other than that of the tolling of the statute of limitations.* If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result" (R. 362, 363, f. 1766). (Italics supplied.)

Referring to the opinion in the *Pomeroy Case*, mentioned by the state Court as governing this case, it appears that the issue decided was thus narrowly stated by that Court:

> "If, within the meaning of the tolling statute, defendant departed therefrom in 1931 and has since resided out of the state, the statute of limitations was tolled and the demurrer [to defendant's plea of limitations] properly sustained. *This presents the one question for decision*" (R. 354, f. 1757). (Italics supplied.)

In no sense could the determination by the Minnesota Supreme Court on the first appeal be regarded as a *final judgment*, because the Court did not purport to put an end to the litigation. Before there could be any final judgment in appellant's favor, it was essential that it be rendered by the trial court after the remand. An analogy is suggested by what this Court said in *McCombs vs. Knox County Comrs.*, 91 U. S. 1, where litigation ended in a court of common pleas after a prior appeal to a state Supreme Court:

> "The supreme court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the common pleas to permit the parties to make a new case by amendment. * * * *The*

final judgment is therefore the judgment of the court of common pleas, and not of the supreme court. It may have been the necessary result of the decision by the supreme court of the questions presented for its determination; but it is none the less, on that account, the act of the common pleas." (Italics supplied.)

The Minnesota Court has repeatedly recognized that a decision on a former appeal is law of the case only so far as applicable to proceedings had in the lower court after remand.

State vs. Red River Lbr. Co., 157 Minn. 7, 14.

County of Redwood vs. City of Minneapolis, 131 Minn. 41, 42.

"There is nothing in * * * the 14th Amendment which prevents a state from permitting an appellate court to alter or correct its *interlocutory decision* upon a first appeal when the same case, with the same parties, comes back before it again; and *whether this is permitted is a question of local law, upon which the decision of the highest court of the state is controlling here.*" (Italics supplied.)

Moss vs. Ramey, 239 U. S. 538, 546-547.

An earlier *decree* may be changed by direct order or indirectly, by construction, while a case remains within the jurisdiction of the state court.

King vs. West Virginia, 216 U. S. 92, 100-101.

A judgment of reversal is not "final" when based upon a ground which may or may not be finally determinative of the case, the case being remanded for proceedings consistent with the point decided.

Haseltine vs. Central National Bank, 183 U. S. 130, 131.

City of Aurora vs. West, 74 U. S. (7 Wall.) 82.

When the case was remanded to the trial court on the first appeal it stood the same as if it had never been tried, excepting as to the sole issue whether appellant's absence from the

state tolled limitations.

Hickey vs. Johnson (C. C. A. 8), 9 F. (2d) 498, 505.

The situation at bar is covered by other decisions of the Minnesota Supreme Court, and by decisions of this Court, cited below:

Sands vs. American Rf. Express Co., 159 Minn. 25, 26.

"Our former decision * * * is invoked by appellants as *res judicata*. It does not have that effect because no issue becomes *res judicata* until made so by final judgment."

In re Estate of Hallbom, 189 Minn. 383, 386.

"There is no doubt but that this court has power to overrule its prior decisions, and may do so in a proper case, even to the extent of overruling the decision made on a prior appeal in the same case."

Kozisek vs. Brigham, 183 Minn. 457, 460.

"In the absence of statute the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power*." (Italics supplied.)

Messenger vs. Anderson, 225 U. S. 436, 444.

Southern Ry. Co. vs. Cliff, 260 U. S. 316, 319.

(2) Because the Case Remained Pending After the First Appeal, and Because It Was the Power, If Not the Duty, of the Lower Courts to Render Final Judgment in the Light of an Intervening and Controlling Statute, Appellant Has Not Been Deprived of Any Right or Property.

We respectfully submit that this appeal should be disposed of upon the theory that all that the Minnesota Supreme Court decided on the first appeal was that limitations had not been tolled by appellant's absence from the state. That Court never explicitly determined that the action was barred,

much less rendered any *final judgment* to that effect. The most that appellant can claim is any inference that must be drawn from the Court's statement that the 1941 law applied to "cases already *pending*, * * * even though it was passed subsequent to a determination by this Court that the cause was barred" (R. 408-409, par. 5). Appellant does seize upon the Court's obviously inadvertent statement that there had been a determination that the cause was barred, as distinguished from the actual ruling that limitations had not been tolled by appellant's absence from the state. But appellant attempts to reject the Court's inseparably connected recognition that this action was "pending" when the 1941 law was passed—after the case had been remanded on the first appeal. Appellant seems to realize that it could have no vested right if the case were still pending.

Conceding, *arguendo;* that, without rendering or ordering final judgment, the State Supreme Court did determine on the first appeal that the cause was barred, its conclusion that the case remained pending should not be disturbed, first, because that Court has final say as to when an action under the state law is pending, and, second, because the conclusion, on its merits, is in harmony with decisions of this Court.

The Minnesota Court has established the rule that an action "is deemed pending until its *final* determination," and will be so regarded when there is nothing to show that it has been "determined or dismissed."

Seeger vs. Young, 127 Minn. 446, 448-449.

That rule accords with this Court's views, as shown by:

Montoya vs. Gonzales, 232 U. S. 375, 376.

Clark vs. Roller, 199 U. S. 541, 546.

Great Western Tel. Co. vs. Burnham, 162 U. S. 339, 342.

In the case at bar the Minnesota Supreme Court distinctly

followed and applied the doctrine of *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 281, that "where a statute which is clearly intended to be retroactive and to apply to pending litigation is enacted after judgment and pending appeal, the appellate court may dispose of the case in accordance with the law as changed by the statute." The New York decision in turn followed these cases decided by this Court:

United States vs. Schooner Peggy, 1 Cranch. 103, reversing a decree of condemnation in admiralty in the light of a treaty, although the decree was correct when made.

Dinsmore vs. Southern Express Co., 183 U. S. 115, giving effect to a statute that took effect after the case was submitted to this Court.

Union Pac. R. R. Co. vs. Snow, 231 U. S. 204, 211, recognizing that "a judgment, though not erroneous when rendered, may become so by subsequent law."

See, also, *Utter vs. Franklin*, 172 U. S. 416, where this Court said of a prior judgment declaring county bonds void, which was nullified by a ratifying statute:

> "The judgment in that case was *res judicata* only of the issues as they then appeared, and of the legislation then existing."

That the 1941 law introduced into the case at bar a *changed condition*, while the cause was still pending, which left it open to the trial court, and, on the second appeal, the state Supreme Court, to consider and apply that law, is demonstrated by the reasoning of this Court in *Gulf, C. & S. F. Ry. Co. vs. Dennis*, 224 U. S. 503. There it was recognized that an "appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."

Obviously, the highest Court of a state may assume the same power or duty with reference to local practice that this Court recognized it possessed as to federal practice, when this Court said:

> "* * * It does not follow that where, pending the writ, a statute of the state or a decision of its highest judicial tribunal intervenes and put an end to the right which the judgment sustains, we should ignore the *changed situation*, and affirm or reverse the judgment with sole regard to the Federal question. On the contrary, we are of opinion that in such a case it becomes our *duty* to recognize the changed situation, and either to apply the intervening law or decision, or set aside the judgment and remand the case so that the state court may do so." (Italics supplied.)

Where a statute was amended while a cause was pending before this Court, effect was given to the amendment, although it had not been considered in the court below.

Carpenter vs. Wabash Ry. Co., 309 U. S. 23, 26-27, 29.

The Court said:

> "For the present purpose, we may assume, without deciding, that the determination of the court below was correct upon the record before it and *in the light of the law as it then stood*. But it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable. * * *
>
> "* * *: There is *no suggestion that the present proceeding had been terminated prior to the enactment of the amendment or that it is not now pending.*" (Italics supplied.)

In *Metzger Motor Car Co. vs. Parrott*, 233 U. S. 36, this Court decided that a litigant did not have a vested right in a decision by the highest Court of a state that a certain local statute was valid, so as to preclude application against him of a later decision of the same Court holding the statute to be unconstitutional.

Appellant's reliance (pp. 19-20) upon intimations in this Court's opinion in *Pope vs. United States*, 89 L. Ed. 5 (Adv.), is unjustified. There it was decided that an unreversed judgment conclusively established that a claimant was not entitled to recover. But the Court recognized that until the judgment became final it was subject to abrogation, saying (pp. 9-10):

> "Before the Special Act the claims of petitioner on his contract with the Government had been passed upon judicially and merged in a judgment *which was final.* * * * This Court denied certiorari, and the judgment, *which remains undisturbed by any subsequent legislative or* judicial *action,* conclusively established that petitioner was not entitled to recover on his claim."

Appellant inappropriately cites *United States vs. Klein*, 13 Wall. 128, and other decisions of this Court on the point that a vested right in a final judgment cannot be divested (pp. 17-18). Those cases are distinguishable on the ground stated by this Court in *Pope vs. United States, supra*, where the Court refers to the opinion in the *Klein Case* as pointing out that Congress could not authorize a court "to render final judgment in those cases and controversies which, pursuant to existing statutes had been *previously litigated.*" (Italics supplied.)

Even where the Minnesota Supreme Court had successively affirmed two judgments denying the same relief, one of the judgments having been rendered ten years before, the Court held that, because of an intervening statute and other changed conditions, there was no bar to a third action for the same relief.

Guilford vs. Western Union Tel. Co., 59 Minn. 332.

In another case, although the Minnesota Supreme Court had decided that the State of Wisconsin could not recover on a note given by defendants to an agent of the plaintiff

State, because taken by him without authority and because its taking had not been ratified, if later ruled that there was no bar to subsequent recovery in a second action on the same note after subsequent enactment of a law ratifying the agent's act.

State of Wisconsin vs. Torinus, 28 Minn. 175.

In the light of the proceedings had in this case, on both appeals below, the case, in principle, falls within this Court's approval of the Pennsylvania Supreme Court's ruling that a prior judgment in a federal court merely adjudicated "plaintiff's right to maintain its action as an unregistered foreign corporation," and that that impediment had been removed by a subsequent statute.

West Side Belt R. Co. vs. Pittsburgh Const. Co., 219 U. S. 92, 98 99, 101.

In *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271 (referred to in our argument under Point II, *post*, because of its strikingly close resemblance, in principle, to the case at bar), the New York Court of Appeals applied a statute similar to the 1941 law as reviving a cause of action, although the trial court and the Appellate Division had declared the action barred under the then existing law.

(3) Plaintiff Did Not Sue Upon Two Separate Causes of Action, One Created by Statute and the Other Arising Under the Common Law, But Upon a Single Common-law Cause of Action in Tort.

Should the Court sustain our above discussed contention that no final judgment was rendered on the first appeal to the Minnesota Supreme Court and that appellant was not deprived of any vested right as to the Court's ruling on that appeal, appellant's Point I must fail, regardless of whether

this action was brought upon one or two causes of action.

However, since appellant's Point 2 (p. 20) largely depends upon the character of the action, special attention should be given to appellant's reiterated statement in its brief, under both Points 1 and 2, that we have sued upon a "statutory cause of action" or "upon a liability created by statute." It is our view that the question whether we have sued upon such a cause of action or upon such liability is not reviewable because the state Supreme Court made a binding characterization of the action as being in tort and rejected appellant's contention that we sued upon a cause of action created by statute.

The decision of the state Supreme Court is to be read in the light of the following legal conclusion reached by the trial court in finding for plaintiff on the merits, both as to fraud and statutory violation by appellant:

> "In so far as the provisions of" the 1941 law "are applicable to plaintiff's *cause of action*, or any of the *separate grounds of relief* asserted by plaintiff, the time for assertion thereof or commencement of the action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of * * * Minnesota" (R. 303-314, ff. 1157-1158). (Italics supplied.)

The opinion of the Minnesota Supreme Court here under review also impliedly treated the case as presenting but a single cause of action based upon dual grounds:

> "The action was brought in tort to recover as damages the purchase price of unregistered securities sold * * * in alleged violation of the securities law, * * * which required their registration. It also sought recovery on the ground of deceit based on misrepresentation, but, in view of our disposition of the case, we need not consider that phase of the case.
>
> "* * * The action is in tort" (R. 191-195, par. 2).
>
> "*The case at bar is to be distinguished from a third*

class of cases where a cause of action is created by statute," etc. (R. 402-403, 408). (Italics supplied.)

If, as we contend, the state Supreme Court's characterization of the cause of action sued upon is binding, because relating to a matter of local law and practice, appellant has tied its own hands by a concession:

"* * * The state court failed to note or give necessary weight to the" factor "that the action was one predicated entirely upon a breach of statutory duty. * * * *Instead, the opinion * * * shows that the action was considered as though it were one to recover upon a common-law liability*," etc. (p. 21).

"The statutory basis of the action is controlling. Calling it an action of damages for tort arising from violation of the statute *(as the court did on the second appeal)* cannot alter its essential character" (pp. 23-24). (Italics supplied.)

But, if appellant could escape from the consequences of its admission that the highest Court of the state characterized the action as being brought to recover upon a common-law liability, it would still face the fact that the Record fails to show that appellant ever seasonably submitted to the Minnesota Supreme Court a contention that two separate causes of action were presented and that one of them was statutory. The state Supreme Court's reference to cases distinguishable as based upon a cause of action "created by statute" does not appear to have been prompted by any such contention by appellant, but was made in classifying the different situations in which a statutory bar by limitations can be lifted retroactively.

(a)

Appellant's Contention Should Be Dismissed as Not Presenting a Federal Question.

Osborne vs. Gray, 241 U. S. 16, 20, holding that whether plaintiff in a personal injury action sued under the common law was purely a state question.

Chicago, Rock Island & P. Ry. Co. vs. Whitaker, 239 U. S. 421, 424-425, holding that a state Court's ruling as to whether a petition stated a cause of action against a resident joined as defendant with a non-resident was not reviewable.

First National Bank vs. Anderson, 269 U. S. 341, 346, refusing to review a state Court's determination that a case was cognizable in equity, and showing that this Court's right to review the effect of pleadings as setting up a right of action or defense is limited to cases where Federal law is involved.

Milk Wagon Drivers' Union vs. Meadowmoor Dairies, 312 U. S. 287, 296, reaffirming the rule that there is no "supervisory power over state practice, * * * not used to evade constitutional guaranties."

Even if, from the viewpoint of this Court, the state Supreme Court erred in construing local laws that would not uphold appellant's contention of deprivation of due process.

Neblett vs. Carpenter, 305 U. S. 297, 302.

(b)

Appellant Is Estopped to Assert That Plaintiff Sued on More Than One Cause of Action.

This phase of the case is disposable on the independent ground that appellant estopped itself in both Courts below to assert the existence of more than one cause of action. In fact, as shown in our Statement of the Case under the subheading, "Character of Cause of Action," *supra*, appellant virtually stipulated that there was but one cause of action involved.

The answer treated the complaint as pleading a single cause of action covering a single transaction (R. 16, 18, par. XI (4) (5)).

Appellant's acquiescence in plaintiff's theory that the complaint stated only a single cause of action is further shown by the colloquy at the opening of the trial (R. 24-25, 29, 33-34).

The last paragraph of the opinion in *Wilson vs. Gregory*, 189 S. C. 62, supports our position that the recitals of the appellant's answer and the colloquy at the opening of the trial above referred to constituted a binding concession by counsel for appellant that the action presented but a single cause of action.

(c)

This Is Not an Action Upon a "Liability Created by Statute."

Should this Court be disposed to review on its merits the state Supreme Court's determination that this is a common-law action, we respectfully submit that that determination is sound under the facts of this case, under well-established practice in Minnesota, and under principles recognized by this Court.

We cannot understand why appellant does not concede binding effect to the state Supreme Court's declaration (R. 404-405, par. 2) that "the action is in tort." We should not be disposed to go back of that declaration except for several inaccurate statements in appellant's brief concerning the nature of previous decisions of the Minnesota Court, and concerning what was held in similar cases passed upon by the Circuit Court of Appeals, Eighth Circuit.

Supporting its conclusion that the action at bar "is in tort," the Minnesota Supreme Court cited a previous decision to which appellant makes no reference—*Dyess vs. Min-*

nesota Petroleum Co., 189 Minn. 608, 611. In that case, an action of the same general kind as our case, the Court specifically declared that the action was brought "on the ground of tort."

Appellant does not claim that the Blue Sky Law specifies that a buyer of illegally sold stock can sue the seller, or that when this action was brought any reference was made in that law to such actions. Even now there is nothing that explicitly confers any substantive rights upon buyers of stock. The most that has been done is merely to prescribe, in the 1941 amendment, the time for bringing actions of this kind.

The Minnesota Supreme Court's conclusion that this is not an action "upon a liability created by statute other than those arising upon a penalty or forfeiture," within *Mason's Minn. Stats., 1927*, Sec. 9191 (2), is in line with the fact that Blue Sky Laws had not been thought of when that statute, substantially in its present form was enacted. Without tracing the statute back to its precise source, it is enough that *Statutes of Minnesota, 1866*, Ch. 66, Sec. 6, contain a clause of identical wording, excepting that "arising" is omitted. There was no Blue Sky Law in Minnesota until 1917 (Laws of Minnesota, 1917, Ch. 429).

True, the opinion of the Minnesota Supreme Court on the first appeal did *casually* say that the action must be considered as one based "upon a liability created by statute," and was to be deemed barred under the six-year statute unless saved by the tolling provision (R. 354, f. 1757). But no issue was then before the Court as to the nature of the action. The sole determination made, that appellant's absence from the state did not toll limitations, rendered it unimportant to classify the action among the subdivisions of the six-year statute because the result would be the same were the case classified as a tort action or as an action on statutory liability. Nor was the observation that the action was barred

unless saved by the tolling statute, through appellant's absence from the state, essential to the sole determination that the statute was not tolled by appellant's absence. Therefore, appellant relies upon *dictum* in the first opinion as opposed to the definite characterization of the action made by the Supreme Court on the second appeal, where classification was first called for by appellant.

Appellant inaccurately asserts (p. 15) that the Court in *Chase Securities Corp. vs. Vogel* (C. C. A. 8), 110 F. (2d) 607, a case admittedly of this type, "treated the cause of action for violation of statute as a distinct cause of action." On the contrary, the Circuit Court of Appeals referred to the statutory violation and the fraud claim as "*grounds* upon which plaintiff claimed the right to recover" (p. 608).

Appellant does not draw attention to the statement in a companion case decided by the Circuit Court of Appeals at the same time as the *Vogel Case, supra*:

> "The question presented * * * is whether the appellee's *cause of action* is barred by the statute of limitations. * * * The right of recovery was based on the *grounds* (1) that the sales were illegal and void because the stocks were not registered, * * * and (2) that there was fraud, both actual and implied, in the sales" *(City Co. of New York vs. Stern*, 110 F. (2d) 601, 602).

Thereby the Circuit Court of Appeals recognized that as to each single sale of stock there was but a single cause of action, although based upon statutory violation and fraud.

In another case of the same kind—*Shepard vs. City Co. of New York* (D. C., Minn.), 24 F. Supp. 682, 684, the decision in which became final without any appeal, Judge Bell specifically considered the nature of the cause of action, saying:

> "Therefore, the first question is on the bar of the statute and that question involves the nature of the cause of action."

After citing and reviewing decisions of the Minnesota Supreme Court, Judge Bell concluded:

> "The Minnesota decisions above cited clearly indicate that the action is not on a contract, express or implied, or on a liability created by statute. * * *
>
> "The action is in tort according to the Supreme Court of Minnesota."

Should this Court be disposed to look beyond the opinion of the Minnesota Supreme Court now under review for light as to the nature of the cause of action sued upon in the case at bar, we are sure that the Court will not overlook the weight to be attached to the views of Judges Joyce and Bell because of their peculiar familiarity with the law and practice of the state in which they reside.

Appellant makes the amazingly inaccurate statement (p. 23) that *Vercellini vs. U. S. I. Realty Co.*, 158 Minn. 72, and other cited Minnesota cases previously established a rule in Minnesota that actions of this kind involve "a statutory cause of action, which cannot exist except for such statute." That statement is particularly inexcusable in view of the Minnesota Supreme Court's citation in the opinion here under review of *Drees vs. Minnesota Petroleum Co.*, 189 Minn. 608, 611, as showing that these actions are in tort. By referring to District Judge Bell's opinion in *Shepard vs. City Co. of New York* (D. C., Minn.), 24 F. Supp. 682, 684, a dependable summary of what was held in the cases cited by appellant will show that those cases do not support appellant's reliance upon them, and that, on the contrary, they show, as declared by Judge Bell, that

> "the action is not * * * on a liability created by statute" (24 F. Supp. 684, 2d col.).

We go back of the *Drees Case, supra*, only to refute appellant's contention that the Minnesota Supreme Court formerly held that actions of this kind were based upon statutory

liability. But it would not help appellant if the decision in this case and in the *Drees Case* were contrary to previous holdings by the Minnesota Court. Such departure would not have deprived appellant of any constitutional right. (*Patterson vs. Colorado*, 205 U. S. 454, 461.)

The Minnesota Supreme Court has long and consistently adhered to—

> "the rule that where the statute for the protection and benefit of individuals, prohibits a person from doing an act, or imposes upon him a duty, if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for any damages resulting proximately from such disobedience or neglect."
>
> *Baxter vs. Coughlin*, 70 Minn. 1, 4.

The Court applied the rule to another and later action by bank depositors to recover from directors deposits received during insolvency of the bank, in violation of a statute.

Olesen vs. Retzlaff, 184 Minn. 624.

In the last cited case the Court said:

> "*The statute does not assume to impose civil liability upon the directors nor to give the depositors a cause of action against them. The liability arises from the application of the general principle that when a statute is enacted for the protection of a class one of the class who suffers damage from its violation may recover of the violator*" (p. 627). (Italics supplied.)

Reviewing the point after reargument, the Court added:

> "A cause of action has come about by the construction of courts because of the violation of a criminal statute. There was no such action at common law; that is, there was no such liability. If there had been a liability there would have been a common law remedy. If there is liability now because of a violation of the statute *there is a common law remedy without specific creation*" (p. 632). (Italics supplied.)

In *Osborne vs. McMasters*, 40 Minn. 103, 105, where common-law and statutory duties affecting liability for personal injuries were mentioned, the Court said:

> "The only difference is that in the one case the measure of legal duty is to be determined upon common law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence. * * * The action in the latter case is not a statutory one," etc.

The cases are in line with *Metropolitan R. Co. vs. District of Columbia*, 132 U. S. 1:

> "The fact that the duty which defendant failed to perform was a statutory one does not make the action one upon the statute."

(d)

This Action Presents a Single Cause of Action Based Upon Several Grounds.

Appellant does not seem to argue that two causes of action are presented, unless it be found that we sued on a statutory liability. It is not contended that the joinder of fraud as one ground of recovery and a *common-law* ground based on violation of the statute, would create more than one cause of action. Such a contention clearly would be fallacious under the authorities above-cited.

In passing, it is to be observed that a conclusion that but one cause of action is involved is in line with a doctrine well-established both in this Court and in Minnesota. Obvious analogies are presented in the cases cited below:

> "That cause of action is the alleged violation by defendant of its duty to exercise proper care to avoid injury to plaintiff while he was upon its train. * * * If defendant violated this duty such violation gave rise to only one cause of action and one remedy, whether the duty was imposed by the Federal statute or by the state

law. *Payne vs. New York, S. & W. R. Co.*, 201 N. Y. 136."

Tudey vs. Oregon Short Line R. Co., 131 Minn. 317, 318.

In *New York Central & H. R. R. Co. vs. Kinney*, 260 U. S. 340, 346, this Court ruled that, as affected by running of limitations, a new cause of action for personal injury was not pleaded by an amendment that brought the case within Federal law by averring that the parties were engaged in interstate commerce. This Court applied what it had said in *Seaboard Air Line R. Co. vs. Kouns*, 239 U. S. 352, 354:

"The facts constituting the tort were the same whichever law gave them that effect.

"The mere multiplication of grounds alleged as causing the same injury does not result in multiplying the causes of action."

Baltimore S. S. Co. vs. Phillips, 274 U. S. 316, 321.

Analogies are furnished by cases where copyright and trade-mark rights are blended with common-law rights:

"The bill alleges the violation of a single right, namely, the right to protection of the copyrighted play. And it is this violation which constitutes the cause of action."

Buck vs. Oursler, 289 U. S. 238, 246.

"The cause of action is the interference with the exclusive right to use the mark 'Nu-Enamel.' If it is a properly registered trade-mark, *a ground* to support *the cause of action* is violation of the Trade-Mark Act. If it is not a properly registered trade-mark, the ground is unfair competition at common law. The facts supporting a suit for infringement and one for unfair competition are substantially the same. They constitute and make plain the wrong complained of, the violation of the right to exclusive use." (Italics supplied.)

Armstrong Paint & V. Works vs. Nu-Enamel Corp., 305 U. S. 315, 324-325.

II.

Appellant's Contention (Point 2), That the 1941 Law, as Construed and Applied by the Minnesota Supreme Court, Deprives Appellant of Property Without Due Process of Law Is Not Reviewable, Because, in Part, it Rests Upon Grounds Not Shown to Have Been Seasonably Presented to, or Ever Passed Upon by, That Court; and Because, in Part, the Contention Rests Upon an Unpermissible Attempt to Contradict That Court Upon Points of Local Law and Procedure. The Court's Decision Is Sound on the Merits.

(See Appellant's Brief, p. 20.)

Appellant's principal contention on this phase of the case is limited by the portion of its Point 2 which we italicize:

> "The 1941 law, as here construed and applied deprives appellant of its *property* without due process of law *because it revives a statutory cause of action which had become barred by the then applicable statute of limitations*" (p. 20). (Italics supplied.)

Elaborating, appellant states:

> "The broader question of legislative power to revive a statutory cause of action, barred under a statute of limitations expressly covering a liability created by statute, has never been squarely determined by this Court. The state court decision, however, is contrary to * * * this Court's applicable cases" (pp. 20-21).
>
> "The state court erred in these respects"—in deciding that this is not a suit on "a liability created by statute" (pp. 21-23).

Upon an obvious assumption that this Court will override the Minnesota Supreme Court's determination that, under local law and practice, this suit was not brought on "a liability created by statute," but is a common-law tort action, appellant proceeds to argue the "Inapplicability of *Campbell vs. Holt*," 115 U. S. 620 (pp. 24-27). But a longer

argument (pp. 27-35) is devoted to "The Error of *Campbell vs. Holt*, Were It Applicable."

A.

Appellant's Point 2 Is Not Reviewable.

(1) Not Seasonably Presented.

If any Federal question is raised by this appeal, the Record will be searched in vain for anything that shows the nature of the question presented, or the grounds preserved below for a review, excepting this short statement in the state Supreme Court's opinion:

> "It is the contention of defendant that the lifting of the bar of the statute in this case is a violation of the due process clauses of the state and federal constitutions" (R. 406, par. 4).

The opinion does not mention any specific contention made by appellant. The state Supreme Court's discussion of the point turned mainly upon "The leading case *cited by plaintiff in support of the legislature's constitutional power to lift the bar* * * * *Campbell vs. Holt*, 115 U. S. 620" (R. 406, par. 4). (Italics supplied.)

As to the existence or not of ground for reviewing appellant's present principal contention that our suit is based upon a "liability created by statute," as to which a statutory bar could not be lifted by retroactive statute, the opinion does not show that appellant raised the point before the state Supreme Court. The opinion merely says on that phase: "The case at bar is to be distinguished from a third class of cases where a cause of action is created by statute * * * and the same statute prescribes a period of limitation within which the cause must be brought" (R. 408). The Record does not show that the Court's holding on that point was

responsive to any contention made by appellant.

So, all that the Record shows, as to preservation of ground for review of appellant's Point 2, is the bare statement in the Minnesota Supreme Court's opinion, already quoted.

Excepting as the opinion itself shows just what subsidiary questions were considered and decided, in upholding the validity of the 1941 law, the case falls within the general rule that a bare averment of a federal question does not give this Court jurisdiction.

> An averment that a statute violates a designated clause of the Federal Constitution "without stating wherein there was such a violation" is "too indefinite to present a constitutional question."
>
> *Lorell vs. City of Griffin*, 303 U. S. 444, 449.
>
> *City of New Orleans vs. New Orleans Water Works Co.*, 142 U. S. 79.
>
> *Clarke vs. McDade*, 165 U. S. 168, 172.

Appellant would not be entitled to a review of grounds not shown to have been passed upon by the state Supreme Court even if they were "more or less similar" to grounds actually asserted.

Osborne vs. Clark, 204 U. S. 565, 568-569.

We have not overlooked the line of decisions of this Court to the effect that the opinion of a state Supreme Court may be examined to determine whether or not a federal question is presented. But we find nothing to show that, in a case like this, the Court will consider contentions of an appellant not shown to have been seasonably presented to, or passed upon by, the state Supreme Court.

(2) Contentions Made by Appellant Contradict Binding Conclusions of the State Supreme Court on Matters of Local Law.

We respectfully submit that, so far as appellant's Points 1 and 2 rest upon subsidiary contentions that this suit is based upon a cause of action created by a statute which makes limitations a part of the right itself, those contentions should be summarily dismissed. As hereinbefore shown under our Point I, *supra*, the Minnesota Supreme Court has bindingly decided that the cause of action is not of that nature.

In a very recent case—*Kraushaar vs. Leschin* (D. C., E. D., Pa.), 4 F. R. D. 143, 144—District Judge Kirkpatrick regarded himself as bound by a state Court decision that a statute was a general statute of limitations and that the time limitation was not a "condition of the cause itself."

That decision respects a long and well-established rule of this Court. *Tioga R. R. Co. vs. Blossburg & Corning R. R. Co.*, 20 Wall. 137, decided that a state court's construction of a statute of limitations, as applied to a foreign corporation, was binding upon this Court. In a concurring opinion, Mr. Justice Hunt aptly observed:

> "Statutes of Limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper."

A state Court decision as to the time within which an action may be brought under the local laws is not reviewable by this Court.

Seneca Nation vs. Christy, 162 U. S. 283.

The Minnesota Supreme Court's opinion does not show that appellant contended that it had been deprived of property

or a vested right, excepting as that may be inferred from a mere quotation from one of its earlier opinions, to the effect that "No man has a vested right to a mere remedy," etc. (R. 407). But that does not suggest that appellant asked the Court to rule that plaintiff's cause of action had been barred by former judgment or by mere lapse of time. (As hereinafter shown, there has never been any adjudication that this action ever was barred, and the nature of the single cause of action sued on is such that such an adjudication could not be expected.)

Search of the Record and appellant's Jurisdictional Statement discloses nothing to indicate the nature and scope of contentions presented below beyond what is shown by the following summary:

The only assignments of error presented to the Minnesota Supreme Court concerning the 1941 law were directed against the trial court's finding that the law applied and refusal to declare that the law did not apply (R. 385, 399, Assignments 31, 42 (a)). Of course, they raised no constitutional question.

The Jurisdictional Statement filed in this Court by the appellant only serves to emphasize the absence of preserved ground for review of appellant's Point 2. We summarize its pertinent passages:

Appendix F, p. 44: Merely shows that appellant asked the trial court to decide that the 1941 law *did not apply to the case.*

Appendix G, p. 45: Merely asked the trial court to decide that the action was barred and was not revived by the 1941 law. (The assertion made in this connection (p. 46) to the effect that if the *Blue Sky Law* applied it was unconstitutional has no bearing on this appeal; it had to do with substantive provisions of that law.)

Appendix G, p. 47: Does show that the broad question whether 1941 law was constitutional, was raised in the trial court by motion for new trial, but no theory as to how it deprived appellant of property without due

process was urged. Appendix II (pp. 48-49) which purports to list errors assigned in the Minnesota Supreme Court on the second appeal, pertaining to the 1941 law, complains only of the trial court's finding that that law was *applicable*.

The briefs filed in this case in the Minnesota Supreme Court are no part of the Record and we do not intimate that they contain anything helpful on this phase of the case to either party. However, foreseeing that our argument above may prompt appellant to re-examine those briefs and possibly to make some use of them on this appeal, we respectfully draw attention to:

Zadig vs. Baldwin, 166 U. S. 485, holding that a Federal question could not be brought into the case by printing an extract from a brief in the state Supreme Court, or by assertion in oral argument in this Court that the question was presented in the state Court.

B.

Appellant's Point 2 Considered on Its Merits.

Even if it were open to this Court to determine the nature of this action under Minnesota law and procedure these decisive facts still would remain: (1) The Minnesota Blue Sky Law does not, and never did, purport to create a right of action in favor of a buyer of securities sold to him in violation of the law. The basis of the action may be violation of the statute, but the right to sue is given by the common law. (2) When this action was brought it was governed by Minnesota's general statutes of limitation applicable to actions generally, statutes which antedated the Blue Sky Law by more than fifty years. There is no contention on appellant's part that the Minnesota legislature ever enacted any statute specifically applicable to an action of this kind until the 1941 law was passed.

(1)

Appellant Erroneously Assumes That This Action Was Barred When Brought.

Hereinafter we meet appellant's argument under its Points 2 and 3 on an assumption, *arguendo*, that this action was barred when brought by the mere fact that more than six years elapsed after plaintiff's purchase of securities from appellant. As shown by the Minnesota Supreme Court's opinion that Court impliedly gave appellant the benefit of that hypothesis. We shall presently refer in detail to considerations that support the Minnesota Court's conclusion that appellant was not deprived of constitutional right.

However, we submit that the Record conclusively establishes a point which in itself is enough to call for dismissal of the appeal. That point is that appellant fails to substantiate its contention that this action was barred before the 1941 law was enacted, a contention upon which appellant's entire brief depends.

Appellant does not controvert the proposition well-established by decisions of this Court:

> The legislature, without violation of the guaranties of due process of law, may extend the period of limitations. *Home Bldg. & Loan Assn. vs. Blaisdell*, 290 U. S. 398.

Starting from the base established under the last subdivision of our argument under Point 1, that this action is on a *single cause of action* grounded upon blended violation of the Blue Sky Law and common-law fraud, we first examine the trial court's unreversed findings. They explicitly found that appellant impliedly represented that the securities had been registered, and "*fraudulently and wilfully*" concealed the facts that the securities had not been registered and that their market price had been manipulated by an illegal pool.

A related finding found that the securities were sold in violation of the Blue Sky Law (R. 303-305, Findings XV, XVII, XIX). The trial court further found that plaintiff had no notice or knowledge of the last-stated facts (R. 304-305, Finding XVIII) until about October 1, 1937 (R. 313, Finding XXXII). Finally, the trial court found that in so far as the 1941 law applies "to plaintiff's *cause* of action or any of the separate grounds for relief asserted by plaintiff," this action "was duly commenced within the time limited by the statutes of * * * Minnesota" (R. 313-314, Finding XXXII).

The Supreme Court, on the second appeal, decided that we were entitled to recover because the evidence was "compelling that defendant sold unregistered stock in violation of the statute" (R. 409), rendering it unnecessary to consider "the ground of deceit based on misrepresentation" (R. 463).

Because of the *singleness of the cause of action* sued on we submit that, in the absence of an *adjudication*, it is not to be assumed that this action was barred by mere lapse of time before the 1941 law was passed. Had the action sought recovery only on the ground of statutory violation there might have been plausibility in assuming that it was so barred. On the other hand, had it counted only on common-law fraud, the action indisputably could not be deemed to have been barred because of the finding as to belated discovery of the fraud. But, since we sued on a single cause of action for redress on account of a single and entire tortious sale, based upon blended statutory violation and common-law fraud, the unreversed findings of the trial court should not be segregated for the sole purpose of establishing a legalistic theory, opposed to equity, that the cause of action was partly barred and partly unbarred.

In any event, appellant rests its appeal on an assertion that there were two separate causes of action, as shown under our Point I, *supra*. It makes no claim that this ac-

tion is in whole or in part barred, excepting as a supposedly separate cause of action was declared to be barred by an *adjudication* on the first appeal. We respectfully submit that, in this situation, this Court would not be justified in basing a decision upon an assumption that any part of the action was barred under Minnesota law before the 1941 law was enacted.

As we read this Court's opinion in *Tiller vs. Atlantic Coast Line R. Co.* (Jan. 15, 1945), 89 L. Ed. 403, 407 (next to the last paragraph), it supports an argument, by analogy, that the main consideration on this phase of the case is that appellant "has had notice from the very beginning" that plaintiff was trying to enforce an entire claim based upon the combined events that led up to a single tort. Therefore, "there is no reason to apply a statute of limitations."

(2)

The Decision Appealed from Is Sound Even If It Be Assumed That the Cause of Action Sued Upon Was Barred, in Whole or in Part, when the 1941 Law Was Passed.

Despite appellant's argument to the contrary, the decision of the Minnesota Supreme Court is supportable on either or both of two doctrines that have been long and frequently recognized by this Court: (1) The doctrine of *Campbell vs. Holt*, 115 U. S. 620, that a statutory bar against an action for the recovery of money constitutionally can be lifted by retroactive statute. (2) The doctrine that equitable considerations can justify lifting of the statutory bar, where vested property rights are not adversely involved.

(a) The Doctrine of Campbell vs. Holt, 115 U. S. 620, Remains Sound and Applies to This Case.

Appellant's contention that *Campbell vs. Holt* does not apply is based upon appellant's conceptions (a) that the doctrine of that case is limited to a holding that a *common law action* "for violation of an implied contract to pay money, previously barred by a *general* limitations statute, could be constitutionally revived by suspension of that statute"; and (b) that, *contrary to what the Minnesota Supreme Court decided*, this is not a *common-law action* to which a *general* limitations statute is applicable (Appellant's Brief, pp. 24-25).

For reasons shown hereinbefore, this action must be regarded as a common-law action which was governed by a general limitations statute. That leaves no basis for distinguishing the *Campbell Case*, unless, as intimated but not argued by appellant, a distinction is to be found in the fact that that case involved an action "for violation of an implied contract to pay money," while this is an action "in tort to recover as damages the purchase price of unregistered securities" (R. 404, f. 1818). What is said at pages 25-26 of appellant's brief shows that no such contention actually is made, for appellant there relies on the theory rejected by the state Supreme Court, that this is a suit on a statutory cause of action.

Appellant merely attempts to establish the applicability of *Danzer & Co. vs. Gulf & Ship Island Ry. Co.*, 268 U. S. 633, and *Davis vs. Mills*, 194 U. S. 451, complaining that the Minnesota Supreme Court erred in refusing to regard the former as being applicable, and in failing to comment upon the latter.

The *Danzer Case* involved a "cause of action * * *, created and limited by the Interstate Commerce Act." But, "the

vase at bar is to be distinguished," said the state Supreme Court, thereby unequivocally holding that plaintiff's right of recovery was not limited or conditioned by any Minnesota statute, general or special. The state court's construction of its own statutes should be final.

Appellant cites *Davis vs. Mills* in support of its argument that the provision which conditions enforcement of a right within a limited time, need not be found in the very statute which creates the right. But in the Davis Case, the qualifying statute was adopted after the enactment of the statute which created the right, and was directed to the liability "so specifically as to warrant saying that it qualified the right." Here, on the contrary, the six-year statute of limitations had existed more than fifty years before the enactment of the first Blue Sky Law in 1917, and the Minnesota Supreme Court properly determined that it did not condition plaintiff's right.

While *Davis vs. Mills* was not cited by the state Supreme Court, the conclusion reached that plaintiff's right of recovery was not conditioned by the general statute of limitations, is supported by settled law of Minnesota:

> "A general statute of limitations does not condition rights. It simply prescribes the time within which rights may be enforced; hence it relates to the remedy only."
>
> *In re Daniel's Estate*, 208 Minn. 420.

The Circumstances of This Case Do Not Call for Any Modification of the Doctrine of Campbell vs. Holt.

Forgetting that it stands before this Court as a tort feasor, and not merely as a contract debtor, appellant at pages 25-37 of its brief stages a crusade against *Campbell vs. Holt*, 115 U. S. 620.

Manifestly, there is no occasion for re-examining the cited

case. It dealt specifically with limitations on actions for the recovery of money on contractual obligations. In those cases the creditor invariably would know, or be bound to know, when his cause of action accrued. And, because a tort feasor can scarcely assert a stronger equity than a contract debtor, the doctrine of the *Campbell Case* can be no less appropriately applied to a tort case than to a contract case. Again, there are two classes of torts: (1) Those which naturally apprise the victim that he has a right of action the moment the tort is committed—*e. g.*, assault and battery, negligent injury, etc. (2) Those, such as the case at bar, where the nature of the tort is such that the victim may not actually discover within many years that he has a cause of action. (Appellant has not suggested how plaintiff could have discovered earlier than she did that appellant had violated the Blue Sky Law or had fraudulently concealed facts bearing upon the value of the stock and the advisability of buying it.)

Therefore, there is no occasion for reconsidering the justness and soundness of the *Campbell Case* as to contract debtors, or even as to tort feasors who are virtuous at least to the extent of letting their victims know when they are injured.

In the *Campbell Case*, *supra*, this Court first referred to instances where long and undisturbed *possession* of property, real or personal, gives title which cannot be divested after a statutory bar has become "perfect." Then the Court applied to contractual obligations for payment of money considerations which clearly are at least equally, if not more, applicable to a tort feasor's liability for inducing his victim to enter into a contract with him:

> "But we are of opinion that to remove the bar which the Statute of Limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground. . . .

"That the proposition is sound, that, in regard to debt or *assumpsit* on contract, the remedy alone is gone and not the obligation, is obvious from a class of cases which have never been disputed. * * * .

"It is much insisted that this right to defense is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

"It is to be observed that the term 'vested right' is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it. * * *

"We certainly do not understand that a right to defeat a just debt by the Statute of Limitations is a vested right, so as to be beyond legislative power in a proper case. * * *

"We are unable to see how a man can be said to have property in the bar of the statute as a defense to his promise to pay. * * * It is new to call the defense of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law.

"We can understand a right to enforce the payment of a lawful debt. * * * We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the Legislature from repealing that law, because its effect is to make him fulfill his honest obligations."

In the interest of brevity, we respectfully refer the Court to pages 16-22 of our previously filed "Statement Opposing Jurisdiction" for citations to authorities in the lower federal courts and in the state appellate courts which have approved and followed *Campbell vs. Holt* in diverse situations. Those citations are rendered specially relevant because of appellant's inaccurate assertion that courts generally have not followed *Campbell vs. Holt*.

There is another reason why it is unnecessary upon this appeal to reconsider the soundness of the *Campbell Case*. Apart from the holding of the *Campbell Case*, there is no constitutional objection to reviving a barred remedy *at a*

time when other remedies still exist.

Assuming, *arguendo*, what appellant claims, that plaintiff's so-called "separate statutory cause of action" was barred by lapse of time prior to 1941, it is clear that plaintiff still held an outstanding, unbarred remedy on other grounds.

In that situation, the legislature had ample power to revive the barred remedy.

Kipp vs. Johnson, 31 Minn. 360.

As there stated by Mr. Justice Mitchell, the lifting of the bar "would not be to divest him (the defendant) of any vested rights or property, but simply to increase the remedies or forms of action in which such rights might be tested."

Kipp vs. Johnson, *supra*, is consistent with the holding of this Court in

U. S. vs. Whited & Wheless, 246 U. S. 552,

that the barring of one remedy does not defeat the right to pursue other unbarred remedies.

Even in jurisdictions which, unlike Minnesota, have not fully followed the *Campbell Case*, the doctrine of *Kipp vs. Johnson* has been followed. A legislature may constitutionally revive a barred remedy at a time when other unbarred remedies still exist.

Power vs. Telford, 60 Miss. 195.

Davis vs. Minor (Miss.), 1 How. 183.

Alvord vs. Little, 16 Fla. 158.

(b) The Minnesota Supreme Court's Decision Is Sound Under a Well-established Equitable Doctrine.

As shown at pages 31-32 of its brief, appellant avoids a candid discussion of a well-established doctrine which is clearly applicable to this case. We refer to the doctrine which appellant seems to concede (p. 32) has been applied

to support the validity of retroactive statutes which serve "some strongly prevailing view of justice."

As applied to this case, the doctrine is probably best delineated—especially in its relationship to *Campbell vs. Holt*—by the decision by the New York Court of Appeals in *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271. The *Robinson Case* was specifically discussed by the Minnesota Supreme Court in its relation to one phase of the case at bar (R. 409). But appellant attempts to dismiss it from consideration on the summary ground that it, the New York Court, merely upheld a special statute "which allowed a widow to sue on a claim which had become barred *during the time she relied upon another statute* subsequently declared invalid." (Italics supplied.)

We submit that the considerations which led the New York Court to its conclusions justified the Minnesota Supreme Court in following that decision in the case at bar. In fact, there are stronger equities in this case. In the New York case plaintiff was merely lulled into reliance upon the validity of a statute afterwards held to be invalid—*a situation for which the defendant obviously was in no way at fault*. Here, the plaintiff had a right to rely upon an assumption that the appellant had obeyed the Blue Sky Law's provisions, at least so far as obedience was essential to a valid sale of stock. Therefore, plaintiff had no ground for even suspecting that she had a cause of action against appellant until she discovered the fraudulent and illegal character of *defendant's own acts* shortly before this action was brought.

Another superior consideration exists in this case in that the 1941 law operated to afford justice to many buyers of securities from appellant and other companies (R. 405) while in the New York case the bar of a statute seems to have been lifted for the benefit of one person.

In the *Robinson Case*, *supra*, plaintiff permitted limita-

tions to run under a wrongful death statute, relying upon a supposed remedy under a provision of the Workmen's Compensation Act. That provision was later held to be invalid. She then sued under the death statute, despite the running of limitations. The Appellate Division of the New York Supreme Court ruled that the action was barred. Then the legislature enacted a statute comparable to the 1941 law of Minnesota now under review. It permitted action in such cases to be brought within one year after the effective date of the act—just as the 1941 law did. Sustaining the constitutionality of the law, the Court of Appeals said, so far as here particularly in point:

> "The situation accidentally produced by reliance on an apparently valid statute reasonably calls for remedy. The bar of the statute *imposed for the protection of the defendants against belated claims* is being used to deprive a *plaintiff without fault of a cause of action based on defendants' wrong.* Here is no arbitrary deprivation by the Legislature of the rights of one party in order to confer a new right upon another party. The Legislature originally *gave this plaintiff a right of action against these defendants.* It imposed a bar after the expiration of a period of time during which it was *contemplated a plaintiff would have reasonable opportunity to enforce the right of action.* * * * She has suffered a legal wrong for which the Legislature gave a remedy, and * * * she has in effect been deprived of this remedy. The extension of time to bring her action was reasonable and this exercise of the legislative power should not be declared invalid because of a constitutional limitation of doubtful application." (Italics supplied.)

Obviously, the reasoning adopted by the New York Court of Appeals supports a view in this case that instinct and reason must revolt at the appellant's invocation of the Due Process Clause as protecting it against liability for *its own wrong* on the ground that plaintiff did not sue in time when she was *practically prevented from suing earlier* than she

did *by appellant's own act* in concealing from her that she had any cause of action at all.

There is another consideration suggested by the decision of the New York Court of Appeals in the *Robinson Case, supra*. Until the Minnesota Supreme Court ruled *January 10, 1941*, by a vote of four to three, that limitations were not tolled by appellant's absence from the state (R. 362, 1766; 209 Minn. 166) there would have been good reason to believe that limitations had not run,—the belated discovery of appellant's fraud entirely aside. The chief justice and two associate justices who dissented were of the opinion that the majority opinion in *City Company of New York vs. Stern* (C. C. A. 8), 110 F. (2d) 601, gave "more satisfactory reasons for holding that the statute of limitations" had been tolled than did the opinion of the four members of the Minnesota Supreme Court who ruled that limitations had not been tolled (R. 362).

The decision in the *Robinson Case, supra*, is here specially important because this Court approvingly cited it in *Paramino Lumber Co. vs. Marshall*, 309 U. S. 370, 379, on the point that "superior equities" may support a statute which lifts a bar to review of a workmen's compensation award which has become final. This Court said:

> "* * * We do not agree that the immunity obtained by the lapse of time for review is the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim."

The *Paramino Case* did not, as claimed by appellant (p. 29), support the retroactive statute there involved on the narrow ground of curing a "fault of administration." It turned upon a consideration of the injustice that would result from refusing to provide a remedy whereby an injured employee could secure a rehearing after expiration of the time for reviewing a final award based on an erroneous find-

ing that he had fully recovered from an accident and had been fully compensated. The Act that was upheld by this Court in the cited case was a private Act of Congress which directed review of an award in a specific case.

This Court said:

> "This private act does not set aside a judgment, create a new right of action or direct the entry of an award. * * * It does not operate to create new obligations where none existed before."

Strong Equities Support the 1941 Law, Both in Its General Interpretation and in Its Application to the Case at Bar, by the Minnesota Supreme Court.

Before considering some of the most pertinent authorities in line with *Campbell vs. Holt*, 115 U. S. 620, and *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, above discussed, we briefly take stock of the equities of the case at bar, equities common to all cases covered by the 1941 law, and particularly those where, as here, the buyer of stock was excusably unaware of the seller's wrong until after the six-year statute had run.

We start with fundamental principles:

> Tort feasors, such as appellant, have no constitutional right to immunity from liability through mere lapse of time; immunity can come only through legislative grace.
>
> *Campbell vs. Holt*, 115 U. S. 620, *supra*.
>
> *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, *supra*.
>
> *Hanenstein vs. Lynham*, 100 U. S. (10 Otto) 483.
>
> *Pittsburgh Can Co. vs. United States* (C. C. A. 3), 113 F. (2d) 824.

As recognized in Minnesota, statutes of limitation rest upon a theory that by *permitting* an obligor, for an *unreasonably long time*, to *believe that no claim exists against him*, the obligee is estopped to assert a claim.

Finley vs. Erickson, 122 Minn. 235, 239.

Important factors giving rise to such estoppel are *failure of the obligee to use ordinary diligence*, and resulting *disadvantage to the obligor*.

McMahan vs. Dorchester Fertilizer Co. (Md. C. A.), 40 Atl. (2d) 313, 315 (Adv.).

The Minnesota Supreme Court has decided that the statutes applicable to the case at bar pertain to remedy and not to substantive right (R. 406-407, par. 4).

In re Daniel's Estate, 208 Minn. 420.

That interpretation of the Minnesota statutes of limitation will be followed by this Court.

Dibble vs. Bellingham Bay Land Co., 163 U. S. 63, 73.

For the purposes of this appeal, the following facts conclusively appear:

"It is quite *obvious* that at the time the securities were sold, they were required by our law to be registered" (R. 404, par. 1). (Italics supplied.)

"* * * The evidence is compelling that defendant sold plaintiff unregistered stock in violation of the statute" (R. 409).

Plaintiff did not discover "the facts concerning the fraudulent and illegal acts of defendant * * * until on or about October 1, 1937" (R. 313, Finding XXXIV). The action was brought in November, 1937. The sale of the stock occurred August 10, 1929 (Appellant's Brief, p. 5). Therefore, at no time during the six years immediately following the sale, nor within the next two years and two months, did plaintiff know that she had any cause of action against appellant.

Nowhere in its brief does appellant assert that it was prejudiced by plaintiff's delay in suing. Appellant merely asserts that plaintiff "slept on her rights" (pp. 32-33), forgetting that it was appellant itself who induced the "slumber."

We believe that the Court will take judicial notice that the factual issues in actions of this kind are of such nature

as to depend but slightly, if at all, upon the testimony of witnesses who may die, disperse or become forgetful. As shown by the excerpts quoted above from the state Supreme Court's opinion, there were but two real issues: (1) Did the law require the securities to be registered? (2) Did appellant sell plaintiff unregistered securities? Obviously, those questions were almost completely answerable by such permanent records as the Blue Sky Law, the regulations under it, and the permanent corporate records of appellant.

It is to be specially noted that the 1941 law is by no means a measure that merely benefits purchasers of securities. On the contrary, the only benefit conferred upon them was that covered by the proviso. The main provision of the law confers a lasting advantage in favor of sellers of securities, in that, as noted by the Minnesota Supreme Court (R. 404, 405), it established a uniform six-year limitation upon actions of this kind, even when grounded upon failure to disclose nonregistration or misrepresentation as to registration, etc. Prior to that enactment, the Minnesota general statute declaring that limitations on a cause of action based on fraud runs from discovery of the fraud (*Mason's Minn. Stats. 1927*, Sec. 9191 (6)) applied to that ground of recovery.

See, *Mary Pickford Co. vs. Bayly Bros.*, 12 Cal. (2d) 501.

Furthermore, since the legislature allowed but one year after taking effect of the 1941 law within which a purchaser of securities might sue, whether upon the ground of violation of the statute or fraud, or both, the result is that those unfortunate purchasers of illegally sold stock who "slept" on their rights until after July 1, 1942, have not since that date had a remedy, although they still would have had one except for the 1941 law, on proving, as we did in this case, belated discovery of fraud.

In the light of the over-all advantage accorded to sellers of securities, they were the chief and primary beneficiaries of the new law. Obviously, the legislature intended the proviso there involved to operate secondarily as a just *saving clause* in favor of those purchasers who had actions pending or might bring them by July 1, 1942.

The 1941 law satisfies the test applied by this Court in *Graham vs. Goodcell*, 282 U. S. 409, in determining the validity of a retroactive act affecting limitations, namely, whether the act "can be applied without injustice."

Here present are considerations that prompted Mr. Justice Holmes, while chief justice in Massachusetts, to uphold the validity of a statute which revived a barred right of action (*Dunbar vs. Boston & P. R. Co.*, 181 Mass. 383, "where in short we cannot say that the legislature with its larger view of the facts may not have been satisfied that substantial justice required its action").

In *Danforth vs. Groton Water Co.*, 178 Mass. 472, the Massachusetts Supreme Judicial Court had affirmed a decision that condemnation proceedings were barred on a certain ground, and "the rescript had gone," before it was discovered that two weeks before the case was decided the Legislature had passed an act prohibiting dismissal of pending proceedings on the particular ground involved. The Court reversed its decision on motion for rehearing.

Speaking for the Court, Mr. Justice Holmes did not commit the Court to an unqualified approval of *Campbell vs. Holt*, but did say much that supports our position:

> "* * * Multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the *prevailing views of justice*, and if the obstacle in the way of the creation seemed small. In some such cases there has been at an earlier time an enforceable obligation, in

> others there never has been one, but in both classes the courts have laid hold of a *distinction between the remedy and the substantive right*, or have said that 'a party has *no vested right in a defense* based upon an informality *not affecting his substantial equities*' • • • or that 'there is *no such thing as a vested right to do wrong*,' • • • or have *dwelt upon the equities*, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written Constitution from interfering with the power to make small repairs which a legislature naturally would possess."

That the principle here involved is applicable, not merely to retroactive statutes affecting limitations, but broadly applies whenever justice demands, is shown by this Court's reference in *Campbell vs. Holt*, 115 U. S. 620, to

> "numerous cases where a contract incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by legislation as to become the proper ground of a valid action. • • • Of like character is the effect of a repeal of the laws against usury, in enabling parties to recover on contracts in which the law forbade such recovery before the repeal."

Without purporting to exhaust authorities which we regard as presenting analogies, we append notes covering typical cases most of which were decided by this Court.•

•(a) *West Side Belt R. Co. vs. Pittsburgh Coast. Co.* 219 U. S. 92, holding that a defense of illegality of a foreign corporation's contract for failure to secure a license can be abrogated, notwithstanding a prior final judgment in defendant's favor. See also: *Producers Naval Stores Co. vs. McAllister* (C. C. A. 5), 278 F. 13, cert. denied 258 U. S. 627; *Hughes vs. Union Savings Assn.* 132 Minn. 19.

(b) *Gross vs. United States Mortgage Co.*, 108 U. S. 477, upholding statute that abrogated defense that foreign corporation could not sue in state.

(c) *McNair vs. Knott*, 302 U. S. 369, deciding that no vested right was violated by validating pledges previously given by banks as securities for deposits.

(d) *Brown vs. Boston & M. R. R.*, 233 Mass. 502, holding that stockholders were not deprived of a vested right by validation of their corporation's *ultra vires* debt.

(e) *United States vs. Heinszen*, 206 U. S. 370, upholding a Federal act that ratified illegal collection of customs duties, although the importer had sued to recover payments. To the same effect is *Rafferty vs. Smith, Bell & Co.*, 257 U. S. 226.

III.

Appellant's Contention (Point 3) That the 1941 Law, as Construed and Applied by the Minnesota Supreme Court, Denied Appellant Equal Protection of the Law, Is Not Reviewable Because Not Seasonably Presented to, or Ever Passed Upon by, That Court. On the Merits, the Contention Is Frivolous, Because the 1941 Law Is Clearly General in Its Scope, and the Opinion of the State Supreme Court Cannot Be Interpreted as Limiting Its Application to Defendant or Any Other Particular Violators Singled Out for Special Treatment, as Appellant Contends.

(See Appellant's Brief, p. 35.)

(1)

Point Not Seasonably Presented.

Appellant does not pretend that it ever invoked the Equal Protection Clause before the Minnesota Supreme Court until it was done in the petition to that Court for rehearing after the case had been decided, which petition was denied without opinion and without ruling (R. 446, 448-450, 474, f. 1936).

As to its Point 3, appellant says nothing about preservation of ground for review below, excepting that the petition for rehearing asserted a violation of the Equal Protection Clause, in that the 1941 law, as construed, "constituted class

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(f) *Luria vs. United States*, 231 U. S. 9, 25-27, upholding retroactive effect of a Federal statute which created a presumption of nonintention to become a citizen, warranting cancellation of naturalization, in the absence of countervailing proof.

(g) *Leloup vs. Texas*, 184 U. S. 156, 158, recognizing the right of a state to apply to taxes already delinquent a new remedy for collection.

(h) *Ewell vs. Daggs*, 108 U. S. 143, holding that, because there is no vested right in a usury defense, repeal of usury statute permits recovery on contract antedating repeal. *Patterson vs. Berry* (C. C. A.), 125 F. 902, holding that defense of usury was taken away by a statute that raised the interest rate.

(i) *Berry vs. Clary*, 77 Me. 482, holding that defendant was not deprived of a "vested" right because a statute invalidated a defense that the contract sued on was made on Sunday.

(j) *Watson vs. Mercer*, 8 Pet. 88, and *Randall vs. Kreiger*, 90 U. S. (23 Wall.) 137, upholding the validity of a statute that cured defective acknowledgment of a deed.

or special legislation against appellant and in favor of purchasers of its stock (R. 446-452, ff. 1889-1897, Point V)." (Appellant's Brief, p. 10.)

Appellant's Points 2 and 3 are not coherent, although each starts out, "The 1941 law, as here construed and applied," etc. (pp. 20, 35). Point 2 does not show just how the law was construed. But the argument under Point 3 asserts that the law was construed as being directed against appellant and another company only (p. 37).

Another queer aspect of appellant's Point 3 lies in the fact that the argument under it is not responsive to the premise of the point that the 1941 law, as construed, reversed a [supposed] determination on the first appeal that this action is barred. The argument is limited to an attack upon the state Supreme Court's statement of facts which may have *influenced* the legislature in enacting the 1941 law.

A paragraph at pages 45-46 of appellant's brief, under its Point 4, suggests that appellant may attempt to excuse its delay in raising Point 3 until the petition for rehearing was filed, on the ground that it could not have anticipated the construction that the state Supreme Court placed upon the statute. But, as will be seen from a discussion below of the merits of appellant's Point 3, the construction actually placed upon the 1941 law by the Court precisely accords with the plain wording of the law. And, manifestly, appellant was bound to foresee that that interpretation would be placed upon the statute. This is especially so in view of the finding of the trial court that in so far as the 1941 law applied to the case, the action was brought in due time (R. 313-314, f. 1157).

The rule deducible from decisions of this Court cited below prevents consideration of appellant's belated contentions under both Points 3 and 4 of appellant's brief, and also wheresoever else in that brief the petition for rehearing is

relied upon as a seasonable preservation of ground for review of questions by this Court:

> Mere *presentation* of a constitutional question in such a petition does not give this Court jurisdiction; the question must have been *considered and explicitly overruled.*
>
> *Cumberland Coal Co. vs. Board of Revision*, 284 U. S. 23, 24.

The contention must have been *entertained and decided in the state court.*

Leigh vs. Green, 193 U. S. 79, 85.

Mallett vs. State of North Carolina, 181 U. S. 589, 592.

"A mere denial of the petition by the state court, without opinion is not enough."

Tidal Oil Co. vs. Flanagan, 263 U. S. 444, 455.

(2)

Appellant's Contention That the 1941 Law, as Construed and Applied, Violates the Equal Protection Clause Is So Manifestly Unsound as to Be Summarily Dismissible as Being Frivolous.

We have previously noted that nowhere in appellant's brief is the Minnesota Supreme Court's interpretation of the 1941 law either quoted or accurately summarized. At pages 35-36 appellant presents, as being the Court's *interpretation* of the law, what the Court "found" concerning circumstances which may have prompted the legislature to enact the statute. This is followed by reliance upon the familiar rule concerning the binding effect of a state Supreme Court's construction of a state statute (pp. 36-37). But that rule is applicable not to what the Court said as to factors that influenced the statute, but to the interpretation actually given to the statute in precise accord with its wording.

Let us first consider the wording of the statute and then the Court's interpretation.

First, the 1941 law prescribes a six-year limitation on *all actions of this kind* based upon illegal sales of securities in violation of provisions of the Blue Sky Law. Then follows, as part of the same sentence, the proviso, the constitutionality of which appellant now questions:

> "provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date" (R. 404).

And here is the Minnesota Supreme Court's interpretation:

> "The plain language of the proviso authorizes the bringing of *all causes where the delivery of the stock had been made more than five years before the effective date of the section*, whether more than six years had elapsed since delivery or not; but it is the contention of the defendant that it should be interpreted as if it read 'more than five years *and less than six years* shall have elapsed,' etc." (R. 405, par. 3). (We have supplied only the first set of italics in the foregoing quotation.)

Because the 1941 law, as worded and as interpreted by the state Supreme Court, applies to illegal sales of stock, whomsoever the offender, the following observation at pages 38-39 of appellant's brief only serves indirectly to draw attention to the general operation of the law without discrimination:

> "There is no conceivably logical basis for legislation enacted for the specific purpose of restoring to purchasers of two stocks in Minnesota rights of action which were not restored to *purchasers of thousands of other stocks in this state during the period 'more than five years' prior to July 1, 1941*." (Italics supplied.)

Appellant thus intimates a concession that, if the 1941 law

applies to all other stocks sold within the period fixed by the statute, there was a "logical basis for legislation." It only remains to determine whether the law did so apply. The *interpretation* of the statute, above quoted, does make it applicable without regard to who sold the securities. Even the excerpt from the state Supreme Court's opinion, commenting upon well-known circumstances which may have *influenced the legislature* to enact the 1941 law, upon which appellant so insistently relies as being an *interpretation* of what was enacted, completely refutes appellant's contention that the statute and its interpretation were directed against appellant and the National City Company. The Court said:

> "That it"—the legislature—"had *all the cases similar to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered.* It was well known that a multitude of sales *of this and other unregistered stock* had been made in this state *shortly before the 1929 crash.* The *evidence* in this case *shows* about 500 sales of Chase units in Minnesota by this defendant in 1929. [It is to be noted that here the Court did not intimate that the legislature had appellant or any other specific securities company in mind.] The legislature must have known that the great bulk of the violations had occurred prior to the crash and that few, if any, had occurred afterwards. * * * If the clause in the proviso relating to causes arising more than five years previously *were to be interpreted as defendant contends, it would apply to few, if any cases.*" (Italics supplied.)

We respectfully submit that what is said above clearly refutes appellant's chief contention under its Point 3:

> "As so construed and applied, the proviso of the law became a special statute which was designed and intended to reopen for a period of one year after July 1, 1941, all claims against appellant and National City Company, only, and as to 'this stock,' *only*; and to leave the bar of the limitations statute unchanged as to all

other corporations and securities, whatsoever their kind or nature" (p. 37).

The Minnesota Supreme Court's opinion does not mention the National City Company in its comments here involved, although that company was the defendant in the companion case decided by the Court on the authority of the decision in the case at bar (*Bain vs. National City Co.*, 216 Minn. 278-279). (No appeal to this Court was taken in that case.)

We invoke as being directly in point this Court's observation in *Quong Ham Wah Co. vs. Industrial Accident Commission*, 255 U. S. 445, 448, 449:

> "* * * If the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the Federal question relied upon."

Apart from the false premise that the 1941 law was specially aimed at appellant, we do not find in appellant's brief complaint against the classification of actions made by the statute. In fact, the statute favored securities companies by prescribing a one-year limit within which actions of this kind could be brought. This is shown by the Supreme Court's observation that the 1941 law operated to shorten the time within which actions of this kind, counting on common-law fraud, as distinguished from statutory violation, could be brought, although such actions might or might not have "accrued more than six years prior to the effective date of the statute" (R. 405). However, in passing, we draw attention to *Depoorest vs. City Bank Farmers Trust Co.*, 88 L. Ed. (Adv.) 340, 347, where an analogous classification was upheld against a contention that Equal Protection had been denied:

> "This statute does not purport to open accountings

> already closed or to take away rights or remainders judicially settled under the old rule. The statute is applied only to judicial settlements *pending at* or *instituted after its enactment*." (Italics supplied.).

As noted at the opening of our argument of this Point (III), appellant's Point 3 (p. 35) is predicated upon an assumption that the 1941 law, as interpreted and applied by the state Supreme Court, "was enacted specifically to reverse the rule of law settled in appellant's favor on the first appeal," but nothing is said in the argument in support of that premise. However, if appellant be given the benefit of its argument under Points 2 and 3 as to what was decided on the first appeal, we would merely come back to the fact that nothing was *settled in appellant's favor*; there was a mere interlocutory ruling that limitations had not been tolled by appellant's absence from the state. Even if there had been inconsistency between the decisions on the two appeals appellant would be confronted by what this Court said in *Milwaukee Electric Ry. & L. Co. vs. State of Wisconsin*, 252 U. S. 100, 106:

> "But * * * the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, * * * any more than, in guaranteeing due process, it assures immunity from judicial error."

IV.

Appellant's Contention (Point 4) That the Minnesota Supreme Court Violated the Due Process Clause by Finding as to the Legislature's Intent in Enacting the 1941 Law, "Without Allowing Appellant a Trial of That Issue or an Opportunity to Know the Factual Basis for Such Finding," Is Not Reviewable Because (1) Ground for Review of the Contention Was Not Preserved in That Court, and Because (2) the Contention Turns Upon a Matter of Local Law and Practice. On the Merits, the Contention Is Frivolously Fallacious, Because (1) the State Supreme Court Did Not Found Its Interpretation of the Law Upon Extraneous Facts, But Upon the Plain Wording of the Statute, and Because (2) the Proof Proposed to Be Offered by Appellant Was Incompetent and Had No Tendency to Establish Legislative Intent.

(See Appellant's Brief, p. 40.)

Like appellant's Point 3, its Point 4 depends wholly upon the fallacious premise that what the Minnesota Supreme Court said concerning well-know facts which might have influenced the legislature to enact the 1941 law was the *interpretation* of the law. Here, again, appellant fails to quote the Court's interpretation, which gave effect to clear, broad statutory wording. But appellant predicates an argument upon the false premise that merely because the Court, in passing, drew inferences as to *why* the law was passed, "The question of legislative intent in this case ceased to be a pure question of law based alone on the words of the statute" (p. 42).

A.

Appellant's Point 4 Is Not Reviewable.

(1) Appellant's Offer of Proof Was Not Seasonably Made.

Appellant's contention that it was unconstitutionally denied opportunity to offer extraneous evidence as to legislative intent is not reviewable, because raised for the first time in a petition for rehearing in the state Supreme Court, and because the petition, which contained numerous other contentions, was denied without opinion.

Godchaux Co. vs. Estopinal, 251 U. S. 179, 181.

American Surety Co. vs. Baldwin, 287 U. S. 156, 163.

At pages 45-46 of its brief, appellant relies upon the doctrine of *Missouri vs. Gehner*, 281 U. S. 313, and *Brinkerhoff-Faris Trust & Savings Co. vs. Hill*, 281 U. S. 673, that this Court can review a Federal question first raised under a state court petition for rehearing, *where it could "not reasonably be held that the company was bound to anticipate such a construction."* (Italics supplied.) Here appellant was bound to anticipate the construction given the 1941 law, because the principal issue submitted to the state Supreme Court on the second appeal, was whether the law manifested legislative intent to lift the bar of limitations in actions of this particular kind. The trial court had found that the law did lift the bar (R. 313-314, f. 1157), and appellant assigned error in that finding on its second appeal (R. 384-385, ff. 1794-1795). Appellant does not claim that either party raised any *factual* issue as to legislative intent in the trial court or in the state Supreme Court, excepting appellant's attempt in its petition for rehearing. That Court clearly disposed of the question as a purely legal issue (R. 405-406, par. 3).

The principal and decisive conclusion reached by the State

Supreme Court was precisely what appellant was bound to anticipate if the ruling of the trial court should be upheld:

> "The plain language of the proviso authorizes the bringing of all causes where the delivery of the stock had been made before the effective date of limitation, if brought within one year from the effective date of the section, whether more than six years had elapsed since delivery or not; but it is the contention of the defendant that it should be interpreted as if it read 'more than five years and *less than six years shall have elapsed*,' etc." (R. 405, par. 3; 216 Minn. 273).

On the hearing of the second appeal appellant invoked the Due Process Clause only against a construction of the statute as lifting the bar of limitations (R. 406, par. 4; 216 Minn. 274).

(2) Appellant's Contention Is Dismissible Because It Involves Unreviewable Action by the State Supreme Court in a Matter Pertaining to Local Practice and Procedure.

Whether or not such evidence as appellant proposed to introduce in this case was admissible was a question as to which the Minnesota Supreme Court had the final say, because it pertained to the judicial construction of a state statute as applied to intrastate affairs. So, even if that Court made a "finding of fact" as to legislative intent, there is nothing here for review.

> "We may at once put aside . . . the assignments involving the construction by the supreme court of the state statutes, and rulings as to the admissibility of evidence."
>
> *Los Angeles Farming & M. Co. vs. City of Los Angeles*, 217 U. S. 217, 226.

Ohio Bell Tel. Co. vs. Public Utilities Comm., 301 U. S. 292, cited by appellant (p. 47) is readily distinguishable. There the evidence offered went to a vital factual issue in

the case. Here there was no issue as to what influenced the legislature in enacting an unambiguous law, and the Supreme Court interpreted it according to its plain meaning, as a matter of law.

B.

On the Merits of Appellant's Point 4.

(1) The Minnesota Supreme Court Founded Its Interpretation of the Statute, Not Upon Extraneous Facts, But Upon the Wording of the Enactment.

That the decision was based upon the intent of the legislature, *as manifested in the language of the statute*, clearly appears from the Court's declaration:

> "The plain language of the proviso authorizes the bringing of all causes," etc. (R. 405, f. 1821).

The state court did not "find"—in the sense that the validity of some judicial conclusions must be supported by findings of fact, which, in turn, must be sustained by evidence—as to just what prompted the legislature to enact the statute. The Court merely observed, in passing, that there was a plain *inference* that the legislature was dissatisfied with the law laid down by the Court on the first appeal in this case (R. 405, f. 1821).

That observation and the other related remarks of the Court concerning conditions that prompted the legislature to act were merely confirmatory within what this Court said in *United States vs. Missouri Pacific Ry. Co.*, 278 U. S. 269, 278:

> "But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used."

That the state Supreme Court merely regarded the circumstances under which the statute was enacted as being con-

firmatory of an intent clearly expressed in the enactment itself is shown by the Court's observation that the legislative purpose was "expressed in clear language without qualification, and the circumstances under which the law was enacted *support the indicated purpose*" (R. 406, f. 1822).

(2) The Proof Proposed to Be Offered Was Incompetent and Had No Tendency to Establish Legislative Intent.

But, even if proper extraneous evidence as to legislative intent had been admissible and tendered seasonably, the fact would remain that appellant tendered no competent or pertinent evidence.

The scope of proof proposed to be offered by appellant is indicated by:

1. An affidavit of the state Commissioner of Securities that "he did not recall that he, or anyone in his department, or any member of the legislature expressed the desire to lift the bar as to any outlawed suits," etc. (R. 426, 427; Appellant's Brief, p. 42).

2. Affidavits of two members of the Minnesota House judiciary committee that no mention was made of the Supreme Court's opinion on the first appeal in committee meetings; and that no "intention was expressed by anyone to revive barred claims," etc. (R. 431-432; Appellant's Brief, p. 43).

3. Official legislative journals and committee reports showing "that in the legislative history of the law there was no affirmative evidence of an intention to revive the barred causes of action," etc. (R. 428-431; Appellant's Brief, p. 43).

A legislator cannot testify, in aid of statutory construction, as to the purpose of an amendment, or his understanding as to the intention of the legislature or of a committee that passed on the measure.

Wiseman vs. Madison Cadillac Co., 191 Ark. 1021.

Even when a statute is ambiguous, legislative intent can not be proved by affidavits of individual legislators or the governor.

Ocean-Forest Co. vs. Woodside, 184 S. C. 128.
City of Spokane vs. State, 198 Wash. 682.

In the last cited case, the Washington Supreme Court said:

> "They"—depositions of state officers and affidavits of legislators—"remain unread in the unbroken original package in which they were brought here; for it is perfectly clear, both upon reason and authority, that the legislative intent cannot be shown or proven in any such manner," citing numerous authorities.

> "The diverse character of such motives"—of individual legislators—"and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."
>
> *Sec. Hing vs. Crowley*, 113 U. S. 703, 711.

In *Moorman Mfg. Co. vs. Industrial Commission*, 241 Wis. 200:

> "We are not at liberty * * * to refer to Committee reports where there can be no doubt of the meaning of the words used."
>
> *Helvering vs. City Bank Farmers Trust Co.*, 296 U. S. 85, 89.

Nor can resort be had to the history of the legislation.
Wilbur vs. United States, 284 U. S. 231, 237.

Granting that, in proper cases, a court may examine legislative debates as part of legislative history, that practice is inapplicable in Minnesota, where the legislative journals do not record debates. Furthermore, appellant's so-called offer of proof was limited to a claim of *absence* of entries in the legislative journals concerning the bill for the 1941 law.

excepting formal recitals as to the introduction and passage of the bill.

What was said in *United States vs. Goldsmith* (C. C. A. 2), 108 Fed. (2d) 917, 919 (certiorari denied, 309 U. S. 678), refutes appellant's contention that legislative journals are of evidentiary value in this case:

> "The claim that the congressional proceedings on the amendment of 1934 disclose a lack of legislative intent to penalize the making of false statements— * * * that the intent was limited to the providing of penalties for wilful injuries— * * * we think is unsupported. At most, the evidence as to such intent is of a negative nature. * * *. In any event, such uncertain and at best negative evidence of legislative purpose cannot serve to limit the clear statement of the new statute."

CONCLUSION

The appeal should be dismissed for want of any properly presented Federal question. In so far as the Court may find that ground for review of any such question was preserved in the Minnesota Supreme Court, we assert that the judgment appealed from should be summarily affirmed because all of appellant's contentions are so fallacious as to be frivolous.

Respectfully submitted,

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